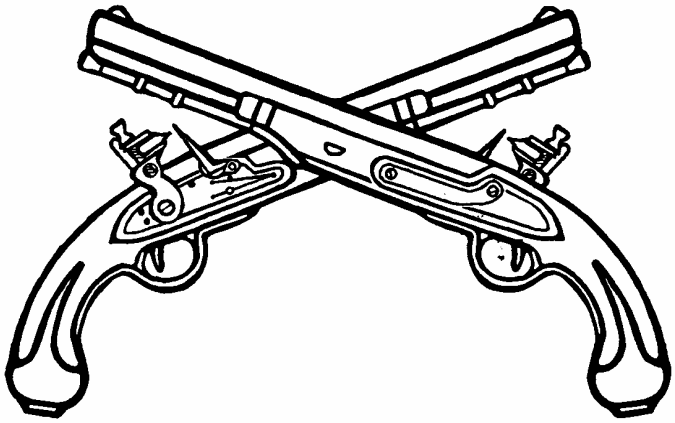
SUBCOURSE
MP1018

EDITION
D

AUTHORITY AND JURISDICTION

MP



SETS THE STANDARD FOR EXCELLENCE

THE ARMY INSTITUTE FOR PROFESSIONAL DEVELOPMENT

ARMY CORRESPONDENCE COURSE PROGRAM

A
I
P
D

READINESS / PROFESSIONALISM

THRU GROWTH

AUTHORITY AND JURISDICTION

Subcourse Number MP1018

EDITION D

United States Army Military Police School
Fort McClellan, Alabama 36205-5030

3 Credit Hours

Edition Date: March 1994

SUBCOURSE OVERVIEW

This subcourse covers the area of authority and jurisdiction. As a military law enforcement officer, you have one of the most demanding jobs in the Army. You must always keep high standards of appearance and job performance. You are charged with the safety of the military community and with keeping order on military installations.

To accomplish these tasks, you are given responsibilities that far outweigh those of the average soldier. In most cases, you will be armed with an MP club and a firearm or some other lethal weapon. In the performance of your duties, you will stop and question people, apprehend those who break the law, and conduct searches and interrogations. If it becomes necessary, you will use force to be certain that law and order are maintained. All of these responsibilities are entrusted to you.

If you are to properly assume these duties, you must have several qualities. One of the most important of these is a good working knowledge and understanding of military law. This subcourse is designed to reinforce the basic knowledge which you may have had in military law, as well as to expand your knowledge in this area. If you do not have any prior familiarity with this area of the law, this subcourse will also give you a basic, working knowledge of its legal principles. The successful completion of this subcourse will help prepare you to assume the added responsibilities of a supervisor over those who are engaged in law enforcement duties.

There are no prerequisites for this subcourse.

This subcourse reflects the doctrine which was current at the time it was prepared. In your own work situation, always refer to the latest official publications.

Unless otherwise stated, the masculine gender of singular pronouns is used to refer to both men and women.

TERMINAL LEARNING OBJECTIVE

ACTION: Determine Investigative Responsibility/Jurisdiction.

CONDITION: You will have this subcourse, pencil, and paper.

STANDARD: To demonstrate competency of this task, you must achieve a minimum score of 70 percent on the subcourse examination.

TABLE OF CONTENTS

THIS PAGE INTENTIONALLY LEFT BLANK

LESSON

DETERMINE INVESTIGATIVE RESPONSIBILITY/JURISDICTION

Critical Task: 191-390-0010

OVERVIEW

LESSON DESCRIPTION:

In this lesson you will learn the sources, range and limits of your power to enforce the law.

TERMINAL LEARNING OBJECTIVE:

ACTION: Determine Investigative Responsibility/Jurisdiction.

CONDITION: You will have this subcourse, pencil, and paper.

STANDARD: To demonstrate competency of this task you must achieve a minimum score of 70 percent on the subcourse examination.

REFERENCE: None.

INTRODUCTION

One of the first things that a military law enforcement officer must learn and understand is the range and limits of his power to enforce the law. This lesson will teach you what you can and cannot do. It will show you where you can operate and the sources of your power. Remember, however, that the situation may differ from one military installation to another. Before starting duties at a new post, therefore, you should have a good working knowledge of local laws and policies that relate to your authority and to your jurisdiction. Additionally, you need to understand the different laws which operate on and off of a military installation, and the limits of court-martial jurisdiction. Since you are a representative of the military justice system, it is necessary for you to understand the basic framework of that system. Out in the field, suspects may challenge your authority. You must, therefore, know just what your authority is. Uncertainty on your part may produce disaster.

PART A - THE SOURCES OF POLICE AUTHORITY

1. General.

Black's Law Dictionary (5th Ed.) defines the term "authority" (p. 121) as "the right to exercise power...to implement and enforce laws; to exact obedience." It defines "jurisdiction" (p. 766) as the "authority by which courts...take cognizance of and decide cases." It is the "power and authority of a court to hear and determine a judicial proceeding...the right and power of a court to adjudicate concerning the subject matter in a given case."

What we are talking about, is POWER. More specifically, we are going to be looking at your powers. When can a military police officer lawfully exercise his authority? What are the limits? When will the courts have the power to try the offenders who violate our law?

2. Sources of authority. Under our system of government, we cannot do things just because we want to do them. A police officer cannot testify in court that he acted in a certain manner simply because he "felt like it." Such testimony in court could prove disastrous. It is important, then, to understand the basis (or sources) for the exercise of one's authority under our system of government. There are several different sources, in descending order:

a. The U.S. Constitution. This is, of course, the highest source of authority under our system of government. Article I, Section 8, empowers Congress "to make rules for the government and regulation of the land and naval forces." Article II, Section 2 of the U.S. Constitution makes the President the Commander-in-Chief of the Armed Forces. The federal courts (ultimately, the U.S. Supreme Court) interpret the meaning of the U.S. Constitution.

b. Acts of Congress, i.e., the UCMJ. In furtherance of the power given it under Article I, Section 8, of the Constitution, Congress enacted the Uniform Code of Military Justice. The UCMJ is an act of Congress, and has the force and effect of such. Another example of a congressional enactment is the U.S. Code, Title 18, which sets forth the main body of federal criminal law.

c. The Manual for Courts-Martial. The President, in his role as Commander-in-Chief of the Armed Forces, has authority to issue Executive Orders pertaining to the military, and particularly military justice. Article 36, UCMJ, gave the President the power to prescribe by regulation "the procedure, including modes of proof, in cases before courts-martial." Similarly, Article 56, UCMJ, gave the President the power to provide punishments for the various offenses under the UCMJ. The President exercised his powers derived from Congress and the U.S. Constitution, promulgating the Manual for Courts-Martial (MCM). First enacted in 1951, it was substantially revised in 1969, and again in 1984.

d. Regulation. There are, of course, service wide (DOD regulations), as well as individual Army regulations, Air Force regulations, Navy regulations,

etc. These may both confer certain powers, and limit others. There are regulations governing such things as the use of deadly force (AR 190-14) and the power to search, seize, and apprehend (AR 190-22).

e. Post regulations. In addition to service-level regulations, there are also installation-level regulations. These, too, have the force and effect of law.

QUESTION: WHAT IF AN ARMY REGULATION OR A POST REGULATION CONFERS UPON AN ACCUSED A RIGHT THAT IS GREATER THAN WHAT THE CONSTITUTION GIVES HIM?

ANSWER: THE CONSTITUTION CREATES MINIMUM RIGHTS. WE CAN GIVE THE ACCUSED NO LESS. THERE IS NOTHING TO STOP US, HOWEVER, FROM GIVING HIM MORE. IT IS, THEREFORE, NECESSARY TO BE CAREFUL WHEN DRAFTING POST REGULATIONS. WE MAY INADVERTENTLY GIVE THE ACCUSED A PROCEDURAL RIGHT THAT THE COURTS WILL ENFORCE, AND THAT WE MAY NOT HAVE MEANT TO CONFER.

QUESTION: WHAT IF THE SOURCES OF AUTHORITY DIRECTLY CONFLICT WITH ONE ANOTHER IN TERMS OF WHAT THE MINIMUM PROTECTIONS ARE?

ANSWER: IF THERE IS A CONFLICT, THE HIGHER SOURCE WILL GOVERN. A REGULATION CANNOT OVERRIDE AN ACT OF CONGRESS, AND THE ACT OF CONGRESS CANNOT OVERRIDE THE U.S. CONSTITUTION. THE U.S. CONSTITUTION, REMEMBER, IS OUR SUPREME LAW. UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION, IT WILL PREVAIL OVER ALL LOWER LAWS THAT INTERFERE WITH ITs PROVISIONS. SIMILARLY, A STATE LAW CANNOT INTERFERE WITH A FEDERAL FUNCTION FOR THE SAME REASON.

f. SOPs. An individual PMO office may have various SOPs which deal with such things as the use of firearms, the procedure involved in making an apprehension, the conduct of juvenile investigations, including procedures for interrogating a juvenile suspect, procedures for conducting a DWI checkpoint, etc.

g. Custom. This is another source of authority. As an example, under Article 92, UCMJ, one may be court-martialed for his "dereliction in the performance of duties." Such a duty "may be imposed by treaty, statute, regulation, lawful order, standing operating procedure, or custom of the service." (MCM, paragraph 16(c)(3)(a).)

Part B - THE ELEMENTS OF THE COMMON MILITARY OFFENSES UNDER THE UCMJ

1. General. One way in which the law recognized the authority of certain individuals is reflected in their protected status. Offenses against these people are made specific criminal offenses. These are sometimes referred to as "military offenses."

2. Disrespect to a superior commissioned officer (Article 89). The elements of this offense are: (1) that the accused did or omitted certain acts or used certain language to or concerning a certain commissioned officer; (2) that such behavior was directed toward that officer; (3) that the officer was the superior commissioned officer of the accused; (4) that the accused knew that this person was his superior commissioned officer; and (5) under circumstances, the behavior or language of the accused was disrespectful to the officer. The victim need not be in the execution of his office at the time of the incident. The disrespect need not be in the presence of the commissioned officer, but must be directed toward him.

QUESTION: WHAT IF THE ACCUSED DOESN'T KNOW THE STATUS OF THE VICTIM?

ANSWER: THE GOVERNMENT MUST SHOW HE KNEW. IT'S AN ELEMENT OF THE OFFENSE. U.S. V. OISTEN, 33 CMR 188 (CMA, 1963). SUCH KNOWLEDGE MAY BE SHOWN BY THE SURROUNDING CIRCUMSTANCES; I.E., CIRCUMSTANTIAL EVIDENCE. WAS THE VICTIM IN UNIFORM? DID HE IDENTIFY HIMSELF? DID THE ACCUSED KNOW WHO THE VICTIM WAS?

QUESTION: UNDER WHAT FACTS MIGHT THE ACCUSED NOT KNOW THE VICTIM'S STATUS?

ANSWER: THE OFFICER-VICTIM MIGHT NOT BE IN UNIFORM, AND THE ACCUSED MIGHT BE FROM A DIFFERENT UNIT. ALSO, INTOXICATION "CAN RENDER AN ACCUSED LEGALLY UNABLE TO KNOW (THAT THE VICTIM) IS HIS SUPERIOR OFFICER." U.S. V. OISTEN, 33 CMR 188 (CMA, 1963). IT'S A QUESTION OF FACT.

Disrespect is defined as that behavior which detracts from the respect due the authority and person of a superior commissioned officer. It may consist of acts or language. It includes name calling, refusing to salute, or showing a marked disdain, indifference, insolence, impertinence or undue familiarity, or other rudeness (MCM, paragraph 13(c)(3)). Truth is not a defense. An accused cannot defend against a charge that he called his commander a "jerk" by showing that the commander really is a jerk.

QUESTION: IS TRUTH A DEFENSE?

ANSWER: NO.

QUESTION: YOU ARE COUNSELING A SUBORDINATE WHEN HE TURNS AND WALKS AWAY. IS THIS DISRESPECT?

ANSWER: YES. IN U.S. V. FERENCZI, 27 CMR 77 (CMA, 1958), THE ACCUSED WAS CONVICTED OF DISRESPECT "BY CONTEMPTUOUSLY TURNING FROM AND LEAVING THE PRESENCE OF THE (OFFICER) WHILE SAID OFFICER WAS TALKING TO HIM."

QUESTION: THE ACCUSED ADDRESSES A FEMALE LIEUTENANT AS "HI, SWEETHEART." IS THIS DISRESPECT?

ANSWER: IN U.S. V. DORNICK, 16 MJ 642 (AFCMR, 1983), THE COURT HELD THAT "ABSENT EXTRAORDINARY CIRCUMSTANCES TENDING TO NEGATE THE IMPLIED SEXIST FAMILIARITY PREFERRED BY AN ENLISTED PERSON TO HIS OR HER

SUPERIOR COMMISSIONED OFFICER BY MAKING SUCH A REMARK, USE OF SUCH A TERM CONSTITUTES DISRESPECT."

QUESTION: DURING HIS COURT-MARTIAL THE ACCUSED POINTS A FINGER AT THE TRIAL COUNSEL AND SAYS, "I AM GOING TO GET YOU." IS THIS DISRESPECT?

ANSWER: YES. U.S. V. GRAY, 14 MJ 551 (ACMR, 1982).

Also, the disrespect must be directed toward the victim. An example of this is U.S. v. Sorrells, 49 CMR 44 (ACMR, 1974). The accused (Sorrells) had gotten into an argument with an individual named Howell. The commander called both of them to his office. Sorrells was highly agitated as he discussed the incident, and started waving his arms and swearing. The commander told him to go to the first sergeant's office and cool off. As Sorrells left the commander's office, he said "I'm going to get that son of a bitch." His conviction for disrespect was reversed, because it was not clear to whom these words were directed.

3. Insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer (Article 91). The elements of this crime are as follows:

a. That the accused was a warrant officer or enlisted member;

b. That the accused did or omitted certain acts, or used certain language;

c. That such behavior was used toward and within the sight or hearing of a certain warrant, noncommissioned or petty officer;

d. That the accused then knew that the person toward whom the behavior or language was directed was a warrant, noncommissioned, or petty officer;

e. That the victim was then in the execution of his office; and

f. That under the circumstances, the accused, by such behavior or language, treated with contempt or was disrespectful to said warrant, noncommissioned, or petty officer.

This article does not require that there be a superior-subordinate relationship. If that element exists, it is an aggravated form of the offense, and subjects the offender to a more serious punishment.

Under Article 91, the disrespect must be within the hearing or sight of the victim. Also, the victim must be in the execution of his office.

For this offense, the NCO must be "in the execution of his office?" This occurs when one is "engaged in any or service required or authorized by treaty, statute, regulation, the order of a superior, or military usage "(MCM, paragraph 14(c)(1)(b).) In U.S. V. NELSON, 38 CMR 418 (CMA, 1968), the court held that "disorder among persons in the military service can have numerous adverse consequences to the military establishment, whether the disorderly

persons are on or off base, or on or off duty. An officer of an armed force acting to terminate disorder among subordinates of his force because of the deleterious effects the disorder might have upon the discipline or the credit of his service is discharging a military function." U.S. V. NELSON, 38 MCR 418 (CMA, 1968).

The definition of "disrespect" under Article 91 is the same as under Article 89. In U.S. V. RICHARDSON, 6 MCR 88 (CMA, 1952), the accused was arguing with another soldier at the MP station. When told by an MP sergeant to be quiet, the accused replied, "sergeant, well, if you don't like it, I'll take you in the back room and fight you too." The court held that "threatening language to a military superior (such as this offer to fight) is per se disrespect."

QUESTION: CAN ONE LOSE HIS/HER STATUS AS A SUPERIOR? ANSWER: YES. "A NONCOMMISSIONED OFFICER WHOSE OWN LANGUAGE OR CONDUCT, UNDER ALL THE CIRCUMSTANCES, DEPARTS SUBSTANTIALLY FROM THE REQUIRED STANDARDS APPROPRIATE TO HIS RANK AND POSITION, UNDER THE SAME OR SIMILAR CIRCUMSTANCES, IS DEEMED TO HAVE ABANDONED THAT RANK AND POSITION." U.S. V. MCDANIEL, 7 MJ 522 (ACMR, 1979). A SUPERIOR, THEN, CAN ABANDON HIS RANK AND POSITION OF AUTHORITY "BY HIS OWN MISCONDUCT." U.S. V. RICHARDSON, 7MJ 320 (CMA, 1979). THIS IS A HIGH STANDARD TO MEET, HOWEVER, AND REQUIRES MORE THAN JUST POOR JUDGEMENT OR EVEN INCOMPETENCY. U.S. V. PRATCHER, 14 MJ 819 (ACMR, 1982). PHYSICAL AND VERBAL ABUSE ARE EXAMPLE OF WHAT MIGHT QUALIFY. U.S. V. GARRETSON, 42 CMR 472 (ACMR, 1969). BY STEPPING OUT OF CHARACTER, THEN, ONE MAY DIVEST HIMSELF "OF THAT CLOAK OF AUTHORITY, RESPECT, AND DIFFERENCE DUE HIM." U.S. V. REVELS, 41 CMR 475 (ACMR, 1969).

One's own misconduct, then, may cost him his official position. In U.S. v. Cheeks, 43 CMR 1013 (AFCMR, 1971), a conviction for disrespect was reversed since the victim had referred to the defendant as "Airman Shits." This was found to be an abandonment of the NCO's status. The same thing can happen to an officer. This is what happened in U.S. v. Struckman, 43 CMR 333 (CMR, 1971). The accused said he wanted to see the Marine Corps on its back. The commander replied, "I represent the Marine Corps. Let me see you put me flat on my back." The accused did so. The victim was deemed to have abandoned his status. Due to the commander’s abandonment of his superior position, the accused wasn't guilty of the assault upon a superior commissioned officer. However, he is still guilty of assault consummated by a battery for punching his commander in the face, because the victim's status is not an element of that offense.

4. Willfully disobeying a superior commissioned officer (Article 90). The elements here are simple: (a) The accused received a lawful command from a certain commissioned officer; (b) the officer was the superior commissioned officer of the accused; (c) the accused knew the victim's status; and (d) the accused willfully disobeyed the order.

A frequent issue here is what constitutes a "lawful order?" An order that requires the performance of a military duty or act may be inferred to be legal. The term "military duty" is a broad one, and includes "all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service." (Manual for Courts-Martial (1984), paragraph 14(c) 2.)

In U.S. v. Smith, 25 MJ 545 (NMCMR, 1987), the accused, a staff member (gunnery sergeant) at the Naval Communications-Electronic School sold his POV to a student at the school. The accused subsequently failed to deliver the title, even after having been paid for the car. When the victim complained to the accused's commander, the commander confronted the accused. When the accused refused to produce the title or take any corrective measures, the commander ordered him to either transfer the title or refund the money. The accused refused and was court-martialed for disobeying the order. Was the order lawful?

The court said it was, as the sale of the car was "a matter of military concern." The transaction occurred "within a military context" and had entangled the military in administrative efforts to resolve the problem. Also, the command's special service officer had acted as the escrow agent, and had been induced by the accused to turn over the money even without receiving the title. This resulted in a freezing of the victim's funds by the credit union and a negative impact on his morale. The order related to a military duty since it was connected to "a military need." The command had an interest in protecting junior personnel from being defrauded by their seniors. The order, therefore, "related to a valid military purpose."

QUESTION: CPT RECKLESS TELLS YOU TO "TAKE CARE" OF THE POWs. WHEN ASKED TO BE MORE SPECIFIC, HE TELLS YOU TO SHOOT THEM AND GET RID OF THE BODIES. IS THIS A LEGAL ORDER?

ANSWER: NO. A PATENTLY ILLEGAL ORDER, DIRECTING THE COMMISSION OF A CRIME, IS NOT A LAWFUL ORDER.

5. Willfully disobeying the lawful order of a warrant officer, noncommissioned officer, or petty officer (Article 91). The elements are:

a. That the accused received a certain lawful order from a certain warrant, noncommissioned, or petty officer. That the accused was a warrant officer or enlisted member;

b. That the accused then knew that person giving the order was a warrant, noncommissioned, or petty officer; (this doesn't include an acting petty officer or acting NCO. U.S. v. Lumbus, 49 CMR 248 (CMA, 1974);

c. That the accused had a duty to obey the order; and

d. That the accused willfully disobeyed the order.

In order to be an "order," it must amount to a positive command. "The recipient of the order must be placed on notice that the (one) who gives the order is bringing his authority to bear to compel compliance. It is important that a (soldier) have adequate notice that words directed at him...are intended as an order, so that he will be well assured that by noncompliance he will subject himself to severe punishment." When a lieutenant told a highly upset soldier to "settle down and be quiet," the court wasn't sure whether it was an order or an attempt at counseling. U.S. V. WARREN, 13 MJ 160 (CMA, 1982). Also, an order cannot be too vague and indefinite. An order "to train" was held to be too unclear, as it didn't direct the accused to do or cease doing any particular thing. It "did not contemplate definite performance of any particular part of the soldier's duties." U.S. V. OALDAKER, 41 CMR 497 (ACMR, 1969).

6. Failure to obey order or regulation (Article 92). This article covers one who violates or fails to obey any lawful general order or regulation or who "having knowledge of any other lawful order issued by a member of the Armed Forces, which it is his duty to obey, fails to obey the order." "An example of the first part would be the Joint Standards of Ethical Conduct Regulation, DOD 5500.7-R, which is punitive and applies to all members of the Federal Executive Branch, including members of the Armed Forces. This regulation was effective on 31 August 1993 and replaces AR 600-50." The accused is presumed to have knowledge of the general order or regulation. U.S. v. Tinker, 27 CMR 366 (CMA, 1969). Ignorance, then, is not a defense here. U.S. v. Leverette, 9 MJ 627 (ACMR, 1980).

An example of the second part is an order which is not prosecutable under Articles 90 to 91. The order may come from a subordinate. The issue is whether the accused had a duty to obey it. An example is a sentinel or MP, who may lawfully give an order even to a military superior. (MCM, paragraph 16(c)(2)C.)

QUESTION: WHAT IF THE DISOBEDIENCE IS THE RESULT OF FORGETFULNESS (AS OPPOSED TO A WILLFUL DISOBEDIENCE)?

ANSWER: IT MAY BE PROSECUTED UNDER ARTICLE 92 AS "DERELICTION IN DUTY."

7. Conduct unbecoming an officer (Article 133). This involves actions or behavior "which in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman." It includes actions in a private capacity which "in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." This offense is shown by "acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty." (MCM, paragraph 59(c)2.)

QUESTION: WHAT ARE SOME SPECIFIC EXAMPLES?

ANSWER: EXAMPLES LISTED IN THE MCM, PARAGRAPH 59(c)3, ARE KNOWINGLY MAKING A FALSE OFFICIAL STATEMENT, DISHONORABLE FAILURE TO PAY A DEBT, CHEATING ON AN EXAM, BEING DRUNK OR DISORDERLY IN A PUBLIC PLACE, AND FAILING WITHOUT GOOD CAUSE TO SUPPORT THE OFFICER'S FAMILY."

8. Fraternization.

a. UCMJ, Article 134. The elements of this offense are: (1) that the accused was a commissioned or warrant officer; (2) that the accused fraternized on terms of military equality with one or more certain enlisted members in a certain manner; (3) that the accused then knew the person(s) to be (an) enlisted member(s); (4) that such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and (5) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of such a nature to bring disrespect upon the armed forces. (MCM, paragraph 83c.)

It is clear that "not all contact or association between officers and enlisted persons is an offense." Instead, this "depends on the surrounding circumstances." Relevant factors include "whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer." (MCM, paragraph 83(c)1.)

This specific offense (Article 134) does not cover relationships between two officers or two enlisted persons. Such relationships may, however, be proscribed by service wide and local regulations. (MCM, paragraph 83(c)2.) Also under this definition, the parties needn't be of different sexes.

b. AR 600-20, paragraph 5-7f. This is a much broader prohibition than the specific one found in Article 134 that we just discussed. Relationships between soldiers of different ranks which involve (or give the appearance of) partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order and discipline and high unit morale. Such relationships, therefore, are improper where they have one of the following effects:

- Cause actual or perceived partiality or unfairness;
- Involve the improper use of a rank or position for personal gain;
- Can otherwise reasonably be expected to undermine discipline, authority, or morale.

Relationships are not, then, inherently wrong. What is important is the effect of the relationship. Many Army regulations, for example, recognize the fact that soldiers of different rank are going to marry one another. Examples are AR 215-2, paragraph 5-13(a)l (use of the Army club system), AR 210-50, paragraph 3-9 (eligibility for post housing), and AR 614-200, paragraph 5-8 (assignments).

A HQDA memorandum for DCSPER (HQDA Ltr 600-84-2), dated 23 Nov 84, subject "Fraternization and Regulatory Policy Regarding Relationships Between Members of Different Ranks," explained:

> "When the senior member has direct command or supervisory authority over the lower ranking member or has the capacity to influence personnel or disciplinary actions, assignments, or other benefits or privileges, there is the strongest justification for exercising restraint on social, commercial, or duty assignments. At the same time, when the senior does not have direct command or supervisory authority over or the capacity to exercise official influence regarding the lower ranking member, relationships between soldiers are not inherently improper. Commanders should advise service members, however, that even these relationships can lead to perceptions of favoritism and exploitation."

This regulatory prohibition is not limited to officer-enlisted relationships. It applies to "service members of different ranks." This includes officers, NCOs, etc.

QUESTION: DOES THE REGULATORY POLICY PROHIBIT ONLY ACTUAL FAVORITISM AND PARTIALITY?

ANSWER: NO. THE APPEARANCE THEREOF IS ALSO CONSIDERED TO BE IMPROPER. STATED DIFFERENTLY, WE DON'T HAVE TO WAIT FOR DISASTER TO STRIKE; RATHER, WE CAN ACT TO AVERT IT. THE RELATIONSHIP CAN BE DEALT WITH WHEN IT CAN "REASONABLY BE EXPECTED TO UNDERMINE DISCIPLINE AUTHORITY OR MORALE."

Known as the "Elton Letter," the guidance form HQDA DSCPER refers to "an actual or clearly predictable adverse impact upon discipline, authority, or morale." An adverse action "must address the behavior that results form the relationship, or the actual or clearly predictable results of the relationship, and not merely the relationship itself."

QUESTION: DO SOME RELATIONSHIPS HAVE A GREATER POTENTIAL FOR ABUSE THAN OTHERS?

ANSWER: SURE. RELATIONSHIPS BETWEEN THOSE IN THE RATING CHAIN ARE AN EXAMPLE.

The Army policy "is one of tolerance," and not a per se prohibition. The problem is to watch for "the possibility for exploitation and favoritism."

The Elton letter set out various factual situations which illustrate the application of the Army's policy. A few are as follows:

QUESTION: LTC X, A SINGLE MALE BATTALION COMMANDER, IDENTIFIED 2LT Y, A JUNIOR SINGLE FEMALE ON HIS STAFF, AS AN UP AND COMING OFFICER. HE TOOK PAINS TO INDIVIDUALLY COUNSEL HER ON HER CAREER PROGRESSION, ASSIGNED HER SEPARATE SIGNIFICANT TASKS, AND ADVISED HER RATER THAT

HE CONSIDERED HER PARTICULARLY OUTSTANDING. AT BATTALION SOCIAL EVENTS HE ALWAYS SINGLED HER OUT FOR DISCUSSIONS TO THE EXCLUSION OF OTHER OFFICERS. HE FREQUENTLY INVITED HER TO ATTEND STAFF MEETINGS AT THE BRIGADE AND DIVISION WITH HIM, ALTHOUGH HE DID THAT FOR NO OTHER LIEUTENANT. JUNIOR MALE AND FEMALE OFFICERS WITHIN THE BATTALION CONSIDERED 2LT Y WAS "GETTING OVER" ON THE SYSTEM, AND HINTED AT A SEXUAL RELATIONSHIP (ALTHOUGH THAT WAS, IN FACT, NOT TRUE). IN GENERAL, JUNIOR OFFICER MORALE WAS LOW BECAUSE OF THE PERCEIVED UNEQUAL TREATMENT. IS THIS RELATIONSHIP IMPROPER?

ANSWER: YES. THIS RELATIONSHIP CLEARLY CAUSED A PERCEPTION OF PARTIALITY OR UNFAIRNESS, RESULTING IN AN ADVERSE IMPACT ON MORALE.

QUESTION: 1LT X, A SINGLE FEMALE, MET SPC BLANKLY, A SINGLE MALE, AT A SOCIAL EVENT FOR SINGLES AT THEIR LOCAL CHURCH AND THEY STARTED DATING. ON THE SECOND DATE, THEY FOUND OUT THAT EACH WAS IN THE MILITARY AND STATIONED AT FORT B. 1LT X WAS IN DIVISION HEADQUARTERS WHILE SP4 BLANKLY WAS IN CORPS HEADQUARTERS. THEY CONTINUED TO DATE, OFF POST AND IN CIVILIAN CLOTHES, TELLING NO ONE OF THEIR RELATIONSHIP. THE COMPANY COMMANDERS ONLY LEARNED OF THE RELATIONSHIP WHEN BOTH REQUESTED LEAVE TO GET MARRIED. IS THE RELATIONSHIP IMPROPER?

ANSWER: THERE IS NOTHING INHERENTLY WRONG WITH THIS RELATIONSHIP. THERE WAS NO ACTUAL OR PERCEIVED PARTIALITY OR UNFAIRNESS, NO IMPROPER USE OF RANK OR POSITION, AND NO UNDERMINING OF DISCIPLINE, AUTHORITY, OR MORALE.

QUESTION: COL X, A SINGLE, INSTALLATION HEADQUARTERS STAFF OFFICER, HAS BEEN A WIDOWER FOR THREE YEARS. AT A HAIL AND FAREWELL HE MET CPT Y, A SINGLE FEMALE OFFICER IN THE HEADQUARTERS. SHE DOES NOT WORK UNDER HIS SUPERVISION. THEY HAVE BEEN DATING FOR THE PAST THREE MONTHS. LAST WEEKEND WAS TO BE A SPECIAL ONE FOR THEM, THE FIRST FREE WEEKEND THAT COL X HAD SINCE THEY MET. THEY HAD RENTED SEPARATE COTTAGES AT THE BEACH AND WERE LOOKING FORWARD TO A WEEKEND OF RELAXATION AND SERIOUS DISCUSSION ABOUT THEIR FUTURE. UNFORTUNATELY, DUE TO A LAST MINUTE SICKNESS, CPT Y FOUND THAT SHE WAS THE WEEKEND DUTY OFFICER. COL X CALLED HIS FRIEND, THE SGS, AND PREVAILED UPON HIM TO FIND ANOTHER OFFICER TO REPLACE CPT Y. IS THIS RELATIONSHIP IMPROPER?

ANSWER: THIS IS AN EXAMPLE OF PREFERENTIAL TREATMENT RISING FROM THE RELATIONSHIP BETWEEN COL X AND CPT Y. WHILE THERE WAS NOTHING INHERENTLY WRONG WITH THEIR DATING, COL X AND CPT Y SHOULD HAVE BEEN AWARE THAT THEIR RELATIONSHIP WOULD CLEARLY BE SCRUTINIZED BY THEIR SUBORDINATES AND PEERS. TAKING ADVANTAGE OF HIS POSITION TO RELEASE CPT Y FROM DUTY IS WHAT THE ARMY'S POLICY IS AIMED AT PREVENTING.

QUESTION: CPT X, A SINGLE FEMALE COMPANY COMMANDER, BECAME ROMANTICALLY INVOLVED WITH SGT Y, A SINGLE ENLISTED MAN IN HER COMPANY. SEVERAL SOLDIERS COMPLAINED TO THE FIRST SERGEANT THAT SGT Y WAS GETTING PREFERENTIAL TREATMENT. WHEN COUNSELED BY HER BATTALION COMMANDER

ABOUT THE ADVERSE IMPACT THE ASSOCIATION WAS HAVING ON THE UNIT, CPT X PROMISED TO TERMINATE THE RELATIONSHIP. SUBSEQUENTLY, THE BATTALION COMMANDER LEARNED THAT THE RELATIONSHIP HAD NOT BEEN TERMINATED AND HAD BECOME A UNIT SCANDAL, CAUSING UNDERMINING OF UNIT MORALE. THE RAMPANT RUMORS AND INNUENDOES ABOUT CPT X'S PERSONAL CONDUCT ON AND OFF DUTY REDUCED HER EFFECTIVENESS AS A LEADER. IS THIS RELATIONSHIP IMPROPER?

ANSWER: THE RELATIONSHIP WAS CLEARLY WRONG BECAUSE IT UNDERMINED MORALE AND COULD REASONABLY BE EXPECTED TO ADVERSELY AFFECT DISCIPLINE AND AUTHORITY. IT EXEMPLIFIES THAT ROMANTIC RELATIONSHIPS BETWEEN MEMBERS OF THE SAME CHAIN OF COMMAND OR SUPERVISION SHOULD BE AVOIDED.

QUESTION: CPT X, A SINGLE MALE, IS THE COMMANDER OF COMPANY C, 1st BATTALION. IMMEDIATELY ADJACENT TO CPT X'S COMPANY IS THE 1st PLATOON OF A COMPANY, 2d BATTALION, TO WHICH SPC Y, A SINGLE FEMALE, IS ASSIGNED. CPT X AND SPC Y DATE OPENLY, AND ARE FREQUENTLY SEEN TOGETHER AT THE PX AND MOVIE THEATERS ON POST. HE HAS TAKEN HER TO THE OFFICER'S CLUB AND ACCOMPANIED HER TO THE EM CLUB ON SEVERAL OCCASIONS. SINCE THEIR RELATIONSHIP BECAME KNOWN, THERE HAS BEEN A NOTICEABLE DECLINE OF MORALE IN BOTH COMPANIES. WHEN SPC Y WAS PROMOTED, MANY OF THE ENLISTED MEN AND WOMEN OF HER PLATOON COMPLAINED TO THE PLATOON LEADER, ALLEGING FAVORITISM BECAUSE OF HER "BOYFRIEND." SPC Y HAS ALSO COMPLAINED ABOUT THE OTHER MEMBERS OF THE PLATOON CONSTANTLY MAKING FUN OF HER ABOUT THE RELATIONSHIP, COMPLAINING THAT THE WOMEN IN THE UNIT WHO ARE FRIENDS OF SPC Y NOW HAVE DIRECT ACCESS TO THE COMMANDER. ONE PFC WAS OVERHEARD SAYING, "ANYTIME I NEED TO GET SOME SLACK I CAN ALWAYS GO SEE TOM (CPT X). HE'LL TAKE CARE OF ME BECAUSE OF SALLY (SPC Y)." IS THE RELATIONSHIP IMPROPER?

ANSWER: THIS IS AN EXAMPLE OF A RELATIONSHIP, NOT IN A CHAIN OF COMMAND OR SUPERVISION, THAT HAS CAUSED THE PERCEPTION OF PARTIALITY AND HAS UNDERMINED UNIT "DISCIPLINE, AUTHORITY, OR MORALE." THE RESPECTIVE COMMANDERS SHOULD OBJECTIVELY DETERMINE AND DOCUMENT THAT THE REGULATORY STANDARDS (PARAGRAPH 5-F, AR 600-20) HAVE BEEN VIOLATED.

QUESTION: IN ONE CASE, DURING THE SUMMER OF 1983, THE ACCUSED (05) WAS THE BATTALION EXECUTIVE OFFICER FOR AN ADVANCED ROTC CAMP AT FORT LEWIS, WASHINGTON. HE WAS RESPONSIBLE FOR TRAINING AND EVALUATING ROTC CADETS WHO MADE UP THE BATTALION, AND FOR THE SUPERVISION OF MILITARY PERSONNEL ASSIGNED AS CADRE. A FEMALE SECOND LIEUTENANT WAS ASSIGNED TO WORK FOR HIM AS AN AIDE AND TRAINING OFFICER. IN THE FIFTH WEEK OF CAMP, THE BATTALION CADRE HAD A BARBECUE. AFTERWARD, THE ACCUSED SAID THERE WOULD BE A "STAFF CALL" AT A LOCAL INN. HE BROUGHT HER SEVERAL DRINKS AND THEY WOUND UP SPENDING THE NIGHT TOGETHER. IS THIS RELATIONSHIP IMPROPER?

ANSWER: YES. THE COURT HELD THAT A SOCIAL RELATIONSHIP/DATING BETWEEN ONE OFFICER AND ANOTHER WHO IS HIS SUBORDINATE (WHERE THE SENIOR OCCUPIES

A POSITION OF COMMAND OR SUPERVISION OVER THE SUBORDINATE) "GIVES THE APPEARANCE OF PARTIALITY AND UNDERMINES DISCIPLINE, AUTHORITY, AND MORALE." IT CONCLUDED:

"WHERE IT IS SHOWN THAT THE ACTS AND CIRCUMSTANCES ARE SUCH AS TO LEAD A REASONABLY PRUDENT PERSON, EXPERIENCED IN THE PROBLEMS OF MILITARY LEADERSHIP, TO CONCLUDE THAT THE GOOD ORDER AND DISCIPLINE OF THE ARMED FORCES HAS BEEN PREJUDICED BY THE COMPROMISING OF (ONE) PERSON'S RESPECT FOR THE INTEGRITY AND GENTLEMANLY OBLIGATION OF AN OFFICER, THERE HAS BEEN AN OFFENSE." U.S. V. CALLOWAY. 21 MJ 770 (ACMR 1986).

c. Relationships with students and trainees. These relationships are stringently regulated, due to the dangers that are inherent in them.

QUESTION: SGT X, A MALE DRILL SERGEANT, INVITED A FEMALE TRAINEE, PVT Y, TO SPEND A WEEKEND WITH HIM OFF POST. SGT X KNEW SUCH CONDUCT WAS WRONG AS THE POST HAD A VERY SPECIFIC REGULATION PROHIBITING ANY SOCIAL RELATIONSHIPS AMONG CADRE/TRAINING CENTER PERSONNEL AND TRAINEES. FURTHERMORE, ALL DRILL SERGEANTS WERE INSTRUCTED QUARTERLY ON THEIR RESPONSIBILITIES FOR AVOIDING SOCIAL CONTACT WITH TRAINEES UNDER ANY CIRCUMSTANCE. WHEN SGT X'S WEEKEND ACTIVITIES WITH PVT Y CAME TO THE ATTENTION OF THE 1SGT, SGT X ARGUED THAT PVT Y WAS NOT EVEN IN THE SAME BATTALION AND THAT IN HIS OPINION, HIS CONDUCT HAD NO EFFECT ON GOOD ORDER, DISCIPLINE, AND MORALE. IS THIS RELATIONSHIP IMPROPER?

ANSWER: YES. IN U.S. V. ADAMES, 21 MJ 465 (CMA, 1986), THE COURT EXPLAINED:

"PROPER RELATIONSHIPS BETWEEN SUPERIORS AND SUBORDINATES ARE VITAL TO DISCIPLINE IN THE ARMED FORCES. WHERE THE SUBORDINATES ARE TRAINEES, THE ARMY HAS AN ENHANCED INTEREST, BECAUSE TRAINEES, WHO USUALLY HAVE LIMITED MILITARY EXPERIENCE AND ARE SUBJECT TO VERY INTENSIVE SUPERVISION AND CONTROL BY THEIR SUPERIORS, ARE VULNERABLE TO TAKING OF UNFAIR ADVANTAGE BY THOSE SUPERIORS. IN TURN, SUCH CONDUCT BY THE SUPERIORS DIMINISHES THE RESPECT WITH WHICH THEY ARE VIEWED BY THE TRAINEES--A RESPECT ESSENTIAL FOR INCULCATING DISCIPLINE."

In another case, the accused was a second lieutenant, and acting platoon leader, in a company of male students. All women students were assigned to another platoon. The accused kept asking one of the female privates to go out on a date with him. The court explained why this was improper:

"Because of their typical lack of experience and maturity, trainees in the armed forces are to some extent at the mercy of the officers and NCOs who supervise them. In recognition of this circumstance and of the potential for disruption of good order and discipline if their superiors take advantage of the opportunity to victimize trainees, many training companies

have issued directives concerning fraternization with trainees." U.S. v. Mayfield, 21 MJ 418 (CMA, 1986).

Fort Gordon's regulation on the subject was at issue in U.S. v. Sartin, 24 MJ 873 (ACMR, 1987). This regulation prohibited social fraternization "between permanent party personnel and a soldier in a training status, a status defined to last until the soldier departs Fort Gordon on permanent change of station. The accused, a staff sergeant, had sexual intercourse with a female student "on the night of her graduation from her training course, prior to her signing out from the school at Fort Gordon on the following day." The court held that the prohibition was necessary "to promote good order and discipline due to the likely susceptibility of trainees to improper influence from those in whose care they have been committed for duty purposes." It "does further a legitimate military need" and is directly connected with "the maintenance of good order and discipline." It is "justified by a compelling military interest." The accused argued that his conduct was not improper as the student had already graduated. The court disagreed:

"We believe that both the susceptibility to improper influence and the actual improper influence are as likely to exist when the act consummating the relationship occurs at the completion of the training cycle as when it occurs during the training cycle. The appellant's relationship with a trainee...could reasonably be expected to adversely affect discipline and authority, such as by causing a perception of partiality or favoritism during an earlier period of the training cycle."

Another example of a local regulation is Fort McClellan Reg 632-1. The general superior-subordinate prohibition states that one "will not engage in any nonprofessional relationship which results in either actual favoritism or improper exploitation of rank or position by the superior, or some actual or clearly predictable adverse impact on discipline, authority, or morale" (paragraph 9). This, of course, is consistent with the Army's regulatory policy we previously discussed.

Paragraph 8 of the regulation covers relationships between permanent party and trainee personnel. It prohibits any "business or business-related activities with trainees, receptees, or students." This includes such things as commercial solicitation and the borrowing of money. It also prohibits the following:

> "Engage in any actual or attempted nonprofessional social relationship of a personal nature with any trainee or receptee, on or off Fort McClellan, that is outside of duty association. This includes, but is not limited to, dating, any type of sexual activity, any touching of a sexual nature, hugging or kissing, hand holding or physical caressing, or attempting or soliciting to do these things with trainees or receptees; drinking or alcoholic beverages with trainees or receptees for any purpose of entertainment, dining, recreation, sport, or intimacy" (paragraph 8c).

Similar prohibitions cover relationships between instructors and students (paragraph 10), and those between students and trainees/receptees (paragraph 12).

9. Assaults. Assaults are aggravated (higher maximum sentence) due to the status of the victim. Simple assault carries a maximum sentence of confinement for three months under Article 128, UCMJ. If the victim is a commissioned officer in the execution of his office, the maximum punishment is a DD and confinement for 10 years (Article 90). Under Article 91, if the victim is a warrant officer, NCO, or petty officer in the execution of his office, the maximum sentence is a DD and five years (warrant officer victim), DD and three years (superior NCO victim), and DD and one year (other NCO or petty officer victim). If the victim is a person acting in the execution of law enforcement duties, the maximum sentence is a DD and CHL for three years.

Any discussion of this crime should include 18 USC, Section 1114, titled "Protection of Officers and Employees of the United States." It lists numerous such officers and employees, and covers the murder (or attempted murder) of them. This law has national and extraterritorial application. In other words, the offender may be prosecuted whether the crime has occurred on an area of federal jurisdiction or not, whether it occurred within the United States or overseas.

Under 18 USC, Section 111, anyone who "forcibly assaults, resists, opposes, impedes, or intimidates, or interferes with any person designated in Section 1114...while engaged in or on account of the performance of his official duties" is subject to a $5,000 fine and imprisonment of not more than three years. If the crime involves the use of "a deadly or dangerous weapon," the punishment is increased to a $10,000 fine and not more than 10 years imprisonment. What these laws do, then, is protect the persons who are so designated, wherever they may be. The purpose is to protect federal officers and employees whose duties involve such things as criminal investigative/law enforcement duties, and whose work involves a substantial degree of physical danger. Without broad federal jurisdiction over these crimes, these individuals may not be sufficiently protected by state law. Also, overseas, their protection would otherwise depend on the willingness of the host nation to prosecute the offender.

28 CFR Part 64, designated certain additional persons to be covered under Section 1114 (and, therefore, Section 111). The law now specifically includes military police and investigators, a term which encompasses investigators in the military criminal investigative organizations, as well as both military and civilian DOD personnel who are engaged in law enforcement, corrections, and guard duties. The addition, then, assures federal jurisdiction to prosecute the killing, attempted killing, kidnapping, assault, intimidation, or interference with any of these people while they are engaged in the performance of their official duties.

PART C - THE AUTHORITY TO APPREHEND

1. Apprehending persons subject to the UCMJ.

a. General.

An apprehension is the taking of a person into custody. An apprehension "is made by clearly notifying the person to be apprehended that person is in custody. This notice should be given orally or in writing, but it may be implied by the circumstances." (RCM 302(d)(1).) It "involves substance rather than form. No specific words or any words at all need be used." U.S. v. Repp, 23 MJ 589 (AFCMR 1986). Telling a suspect to freeze and get up against a wall was held to be sufficient in U.S. v. Walker, 13 MJ 982 (ACMR 1982).

b. UCMJ/MCM provisions. Article 7, UCMJ, states: "Commissioned officers, warrant officers, petty officers, and noncommissioned officers have authority to quell quarrels, frays, and disorders among persons subject to this chapter and to apprehend persons subject to this chapter who take part therein." RCM 302(b) states that "the following officials may apprehend any person subject to trial by court-martial...all commissioned, warrant, petty, and noncommissioned officers."

Article 7, UCMJ, also provides that "any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." Also, RCM 302(b)(1) states that "the following officials may apprehend any person subject to trial by court-martial...military law enforcement officials. Security police, military police, master-at-arms personnel, members of the shore patrol, and persons designated by proper authorities to perform military criminal investigative, guard, or police duties, whether subject to the Code or not, when, in each of the forgoing instances, the official making the apprehension is in the execution of law enforcement duties." The authority under Article 7 and RCM 302 is not limited to on-post apprehensions.

"An Army MP may, of course apprehend a sailor or an airman. Article 7, UCMJ, and RCM 302 apply to the apprehension of "any person subject to trial by court-martial." One may lawfully apprehend a superior, but there are a couple of cautionary notes to be made here. First, RCM 302(b)(2) adds that "noncommissioned and petty officers not otherwise performing law enforcement duties should not apprehend a commissioned officer unless directed to do so by a commissioned officer or in order to prevent disgrace to the service or the escape of one who has committed a serious offense." Also, RCM 302(b)(1) points out: "whenever enlisted persons, including police and guards, apprehend any commissioned or warrant officer, such persons should make an immediate report to the commissioned officer to whom the apprehending person is responsible."

c. Regulations. There are various regulations that deal with the power to apprehend. As was explained, these constitute sources of authority.

(1) AR 190-30. Paragraph 4-8a states: "MPI have authority to make apprehensions in accordance with Article 7, UCMJ... They may obtain personnel for identification and remand custody of persons to appropriate civil or military authorities as necessary."

(2) AR 190-22. Paragraph 2-3(c) defines a person authorized to apprehend to include "all commissioned, warrant, and noncommissioned officers and, in the execution of their guard or police duties, military police and persons designated by proper authority to perform guard or police duties."

(3) AR 190-56. Paragraph 5-2(a) states: "Federally employed Army civilian police and security guards, performing law enforcement and security duties authorized by the installation commander, may apprehend any person found on the installation for offenses committed on post that are felonies, breaches of the peace, or otherwise a threat to property or welfare."

RCM 302 applies to "military law enforcement officials," a term which encompasses personnel "whether subject to the code or not." It thus includes DA civilian guards/security personnel.

d. The apprehension of civilians.

(1) General. The installation commander is responsible for the "maintenance of law and order at the installation." Based on this, the Judge Advocate General of the Army has concluded that "when a military policeman, acting as the agent of the installation commander, restrains or apprehends a civilian for an on-post offense, the military policeman is acting in an official capacity." (DAJA-AL 1979/2975.) It has similarly been determined that:

> "DA civilian law enforcement personnel and guards, when authorized by the local commander, can apprehend and detain DOD civilian employees and non-DOD civilians when on post and for offenses committed on post under the general authority of the installation commander to maintain law and order on the installation...The authority of contractor personnel to apprehend or detain individuals can be ascertained only by examining the contract under which such personnel are performing." (DAJA-AL 1979/3255.)

(2) Regulations. Again, there are various regulations that deal with the authority of our law enforcement personnel to apprehend civilians who commit crimes on post.

(a) AR 190-30. Paragraph 4-8a covers MPI agents: "Civilians committing offenses on U.S. Army installations may be detained, until they can be released to the appropriate federal, state, or local law enforcement agency."

(b) AR 190-22. Paragraph 2-3(c) does not limit the power to apprehend to only military subjects.

(c) AR 190-56. Paragraph 5-2(s) defines the power to apprehend as covering "any person found on the installation." Again, it is not limited to only military subjects. Remember, this regulation covers federally employed civilian police and security guards performing law enforcement and security duties authorized by the installation commander. Also, keep in mind that the authority of civilian contractor personnel is generally covered by "the terms of the particular contract under which they are operating."

Military law enforcement authorities have no general authority to apprehend a civilian off post, in the absence of an applicable state law. AR 190-30, paragraph 4-2a, states: "in Conus, incidents occurring off post normally are investigated by civil law enforcement agencies." As we shall see later, the military may, however, investigate a crime off post so long as there is a "direct" military interest in it (CIDR 195-1, paragraph 2-2c). In other words, the investigation must "satisfy ARMY investigative needs in a criminal matter of ARMY interest." Such actions are not in violation Posse Comitatus Act (AR 195-2, Paragraph 3-1b). The authority to investigate does not confer a general authority to apprehend civilians off-post.

CIDR 195-1, paragraph 3-3(b), notes that CID special agents "may seek and execute federal search warrants" under Federal Rule of Criminal Procedure 41. There must, of course, be "probable cause to believe that the search will result in the seizure of evidence of a crime that is within the investigative jurisdiction of the Army." This is authority by 28 Code of Federal Regulations (CFR) 60, but they "must first coordinate with the local supporting SJA officer and obtain the concurrence of the appropriate U.S. Attorney before seeking the warrant...off of the installation." (CIDR 195-1, paragraph 3-3b.) Remember, "criminal investigators serving or executing search warrants off military installations pursuant to this authorization shall ensure that they are accompanied and assisted by a law enforcement officer having statutory authority to make an arrest in the event that such action becomes necessary" (paragraph 3-3d).

AR 190-22, paragraph 2-1(b), states: "Searches conducted off military installations or in areas or buildings not under military control normally must be conducted by civilian authorities under the authority of a search warrant...military personnel, when directed by competent authority, may accompany civilian police in the execution of a search warrant. Overseas, off-post actions are appropriate "if such action has been consented to by host country authorities."

QUESTION: DOES THE MILITARY RECOGNIZE "CITIZEN ARREST" AUTHORITY?

ANSWER: YES. AR 600-40, PARAGRAPH 3(a), STATES THAT "ALL MEMBERS OF THE ARMED FORCES, ACTING IN A PRIVATE CAPACITY, HAVE THE ORDINARY RIGHT OF CITIZENS TO ARREST IN THE MAINTENANCE OF PEACE, INCLUDING THE RIGHT TO APPREHEND SUSPECTED OFFENDERS. THIS RIGHT TO MAKE A 'CITIZEN'S ARREST' IS GOVERNED BY THE SUBSTANTIVE LAW APPLYING AT THE PARTICULAR LOCALITY, HOWEVER, AND CARE SHOULD BE EXERCISED TO AVOID EXCEEDING THE CITIZEN'S ARREST' AUTHORIZATION GRANTED BY THE LAW OF THAT LOCALITY."

PART D - THE USE OF DEADLY FORCE

1. General. AR 190-14 applies to "DA law enforcement and security personnel." Deadly force is considered to be a "last resort," to be used "when all lesser means have failed or cannot reasonably be used." It is justified under several circumstances. One is in self-defense "when in imminent danger of death or serious injury." Another example is "to prevent actual theft or sabotage of property (such as operable weapons or ammunition) which could cause deadly harm to others in the hands of an unauthorized person." Another is "to prevent serious offenses against a person or persons" (e.g., armed robbery, rape, or violent destruction of property by arson, bombing)."

2. The Constitutional issue. In Tennessee v. Garner, 85 L.Ed.2d 1 (1985), the police responded to a "prowler inside" call. It was 10: 45 P.M. Upon arriving at the scene, the police saw a woman standing on her porch, gesturing toward an adjacent house. She told them that someone was breaking in next door. The police went to that house, heard a door slam, and "saw someone run across the backyard." A police officer, with the aid of a flashlight, could see the suspect's face and hands, saw no sign of a weapon, and "figured" the suspect was unarmed. He also thought the suspect was 17-18 years old. When the officer yelled for the suspect to halt, the individual started to climb a fence to escape. The officer then fired a single shot, striking the suspect (a 15-year old) in the back of the head, killing him. The officer had acted on the basis of Tennessee's "fleeing felon rule."

The Supreme Court held that an apprehension by the use of deadly force is a "seizure;" thus, it must meet the Fourth Amendment's standard of reasonableness. Even if there is probable cause for the apprehension, this does not always justify killing the suspect in the process, at least where the suspect is "nondangerous." The Court explained:

> "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable...where the suspect poses no threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so...A police officer may not seize an unarmed nondangerous suspect by shooting him dead."

QUESTION: UNDER THIS STANDARD, WHEN WOULD DEADLY FORCE BE AUTHORIZED IN THE APPREHENSION OF A FLEEING FELON?

ANSWER: THE SUPREME COURT EXPLAINED: . "WHERE THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THE SUSPECT POSES A THREAT OF SERIOUS PHYSICAL HARM, EITHER TO THE OFFICER OR TO OTHERS, IT IS NOT CONSTITUTIONALLY UNREASONABLE TO PREVENT ESCAPE BY USING DEADLY FORCE. THUS, IF THE SUSPECT THREATENS THE OFFICER WITH A WEAPON OR THERE IS PROBABLE CAUSE TO BELIEVE THAT HE HAS COMMITTED A CRIME INVOLVING THE INFLICTION OR THREATENED INFLICTION OF SERIOUS PHYSICAL HARM. DEADLY FORCE MAY BE USED."

PART E - JURISDICTION OVER AREAS OF LAND AND THE DISPOSITION OF CIVILIAN OFFENDERS

1. General. The installation commander is responsible for the maintenance of law and order on post. This is Stated in AR 210-10, paragraph 2-9. Also, DOD Directive 5200.8 (July 29, 1980), states: "It is the policy of the Department of Defense that military installations, property, and personnel be protected to the extent practical and that applicable laws and regulations be enforced. The authority of an installation commander to take such steps as are reasonably necessary and lawful, to maintain law and order and to protect installation personnel and property, has long been recognized. This authority extends to temporarily established "federal areas" under emergency situations such as accident sites involving federal equipment or personnel on official business." This authority "also includes the removal from or the denial of access to an installation or site of individuals who threaten the orderly administration of the installation or site."

2. Bar letters. 18 USC Section 1382, states: "Whoever, within the jurisdiction of the United States...goes upon any military, Naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or regulation: or whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof--shall be fined not more than $500 or imprisoned not more than six months, or both."

This law was challenged in U.S. v. Albertini, 472 US 675 86 LEd 2d 536, 105 SCt 2897 (1985). The defendant and a companion had entered Hickman AFB in order to present a letter to the commander. Instead, "they obtained access to secret Air Force documents and destroyed them by pouring blood on the papers." The defendant was given a bar letter by the commander, informing him that he was forbidden to reenter without written permission of the commander. Nine years later, in 1981, Hickam AFB had an open house day, and the gates were "open to the public." Radio announcements proclaimed that "the public is invited." The defendant attended the open house "in order to engage in a peaceful demonstration criticizing the nuclear arms race." He was apprehended and charged with violating Section 1382, by having unlawfully and knowingly reentered Hickam AFB after having previously been barred therefrom.

The defendant first argued that a bar letter could not last indefinitely. The Supreme Court held otherwise, explaining that the law was not limited to reentry within a "reasonable" period of time. Instead, Section 1382 "does not limit the period for which a commanding officer may exclude a civilian from a military installation." The defendant's second argument was that he had a First Amendment right to demonstrate on the installation. The Court explained that the statute (Section 1382) was "content-neutral and serves a significant government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security. Application of a racially neutral regulation that incidentally burdens speech satisfies the First Amendment if it furthers an important or substantial governmental interest; it the government interest is unrelated to the suppression of free

expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." The defendant's final argument was that the bar letter was inoperative, since he had been invited to attend the open house. The Court disagreed:

> "The fact that (the defendant) had previously received a valid bar letter distinguished him from the general public and provided a reasonable grounds for excluding him from the base. That justification did not become less weighty when other persons were allowed to enter...Where a bar letter is issued on valid grounds, a person may not claim immunity from its prohibition on entry merely because the military has temporarily opened a military facility to the public."

QUESTION: CAN THE PROVOST MARSHAL OR COMPANY COMMANDER ISSUE SUCH A LETTER?

ANSWER: NO. IT MUST BE SIGNED BY THE POST COMMANDER.

3. Territorial (area) jurisdiction.

a. General. We have already seen that our military police may apprehend civilians on post. As we will see shortly, there is no court-martial jurisdiction over civilians, except during times of declared war. If the military cannot prosecute the offender the question is simple: who can? Obviously, if the answer is "nobody," we have a very serious problem--civilians could commit crimes on post with immunity. Fortunately, that is not the case. Civilians who commit crimes on post ARE subject to criminal prosecution. The question is: By who? First, they may be subject to prosecution by the federal government for the violation of federal criminal law. The federal criminal law is called the United States Code. Title 18 contains the main body of federal criminal law.

Another possibility is that the civilian may be subject to prosecution by the state authorities for a violation of state law. The problem is: how do you tell which it is? The answer depends on what sort of territorial (area) jurisdiction that may exist on post. Note that several different areas may exist on a single installation.

b. Exclusive federal jurisdiction. This means that the federal government has all of the authority here, "with no reservation by the state of any authority except the right to serve civil and criminal process." (DA Pam 27-21, paragraph 2-5(b)(1).) Stated simply, the federal government has the power to prosecute an offender for a violation of federal law committed here; the state, however, does not have the power to prosecute here. Federal law applies here, but state law does not. If a civilian commits a crime here, then he can be prosecuted by the U.S. Government for a violation of the U.S. Code. The state, on the other hand, will not have the power to prosecute for a violation of state law.

c. The Assimilative Crimes Act (18 USC Section 13).

QUESTION: WHAT IF A CIVILIAN COMMITTED A CRIME ON AN AREA OF EXCLUSIVE FEDERAL JURISDICTION, BUT THERE WAS NO APPLICABLE FEDERAL LAW TO PROSECUTE HIM UNDER?

ANSWER: AS WE HAVE ALREADY SEEN, THE STATE HAS NO AUTHORITY TO PROSECUTE HERE; SINCE IT IS AN EXCLUSIVE FEDERAL AREA, ONLY THE FEDERAL GOVERNMENT CAN PROSECUTE THE OFFENDER. IF THERE IS NO APPLICABLE FEDERAL LAW TO COVER THE OFFENSE THAT WAS COMMITTED, THE FEDERAL GOVERNMENT MAY STILL BE ABLE TO PROSECUTE THE OFFENDER BY VIRTUE OF WHAT IS CALLED "THE ASSIMILATIVE CRIMES ACT." THIS STATUTE STATES THAT IN THE ABOVE SITUATION, WE WOULD THEN LOOK TO STATE LAW. IF THERE IS NO FEDERAL LAW ON POINT, BUT THE CRIME IS A VIOLATION OF THE STATE LAW "IN WHICH SUCH PLACE IS SITUATED," THEN THE STATE CRIMINAL LAW IS ADOPTED AND ASSIMILATED (MADE A PART OF) THE FEDERAL CRIMINAL LAW. THE DEFENDANT IS THEN PROSECUTED BY THE FEDERAL GOVERNMENT, NOT BY THE STATE. REMEMBER, THE STATE DOES NOT HAVE THE POWER TO PROSECUTE HERE.

This law applies to crimes that are committed on areas of "special maritime an territorial jurisdiction of the United States," which includes areas under either exclusive or concurrent jurisdiction (18 USC Section 7).

Similarly under Article 134, if there is no applicable provision of the UCMJ covering an offense, a soldier may be court-martialed for a violation of a state law which has been assimilated.

d. Concurrent jurisdiction. As the name implies, this means that the state has reserved the right to exercise its authority "concurrently with the United States." (DA Pam 27-21, paragraph 2-5(b)2.) One who commits a crime here, then, could be prosecuted by the state government. He could also be prosecuted by the federal government. Remember, BOTH governments have authority here, and the laws of both apply.

QUESTION: CAN BOTH THE FEDERAL AND STATE JURISDICTIONS PROSECUTE SOMEONE FOR THE SAME OFFENSE?

ANSWER: YES. THE DOUBLE JEOPARDY PROHIBITION IN THE U.S. CONSTITUTION PREVENTS MULTIPLE PROSECUTIONS BY THE SAME SOVEREIGN. THE FEDERAL GOVERNMENT AND THE STATE GOVERNMENT REPRESENT TWO SEPARATE SOVEREIGN ENTITLES.

An interesting example of this principle is Heath v. Alabama, 474 US 82, 88 LEd 2d 387, 106 SCt 433 (1985). The victim was kidnapped in Alabama, but her body was found in Georgia (after she had been murdered in Georgia). Both states pursued an investigation into the matter. The defendant was arrested in Georgia and prosecuted for "malice murder." He was convicted and given a life sentence. He was then prosecuted by Alabama for the crime of "murder during a kidnapping." Although the kidnapping itself began in Alabama, the murder had occurred in Georgia. The Alabama law, however,

provided that if the crime began in Alabama, it could be punished there, even if the actual murder occurred elsewhere. The defendant was convicted, again, and given another life sentence.

The Supreme Court ruled that "successive prosecutions by two states for the same conduct are not barred by the double jeopardy clause." The Court explained that the federal government is a "separate sovereign" from a state government. At the same time, "the states are no less sovereign with respect to each other than they are with respect to the federal government." Each state, then, is an independent sovereign entity.

The military is, of course, a part of the federal government. Consequently, a soldier could be prosecuted by the military (Court-martialed) and also be prosecuted by the state. This would be a possibility, for example, if the crime was committed on an area of concurrent jurisdiction. As we will see shortly, this could also happen if the soldier committed the crime off post. DA policy, however, is that "a person subject to the UCMJ who has been tried in a civilian court may, but ordinarily will not be tried by court-martial or punished under Article 15, UCMJ, for the same act over which the civilian court has exercised jurisdiction." (AR 27-10, paragraph 4-2.)

When a soldier commits a crime on an exclusive or concurrent jurisdiction area, the federal civilian authorities may also want to prosecute him (for a violation of the U.S. Code). If the military also wants to prosecute the offender at a court-martial, a conflict may result. Since both represent the same sovereign (the U.S. federal government), they could not both prosecute him for the same crime, as this would be a double jeopardy violation. To avoid possible conflicts in the area there is a memorandum of understanding (MOU) between DOJ and DOD. This MOU "established policy for the Department of Justice and the Department of Defense with regard to the investigation and prosecution of criminal matters over which the two departments have jurisdiction." (AR 27-10, paragraph 2-7.) Its goal is "to encourage joint and coordinated investigative efforts." As an example, crimes involving bribery and conflict of interest involving military or civilian DOD personnel will be referred to the FBI.

e. Proprietary jurisdiction. Here, the federal government "has not obtained any measure of the state's legislative authority over the area." (DA Pam 27-21, paragraph 2-5(b)(4).) The military, for example, may simply be using the area, such as by renting space. As a general rule, the state has the power to prosecute an offender for a violation of its law; state law applies, but federal law generally does not. Consequently, a civilian who commits a crime here would be prosecuted by the state authorities, not by the federal government. The federal government would lack the authority to prosecute. Keeping mind that a soldier may be prosecuted no matter where the crime has been committed; i.e., on post, or off post. We will return to this concept shortly.

f. Federal crimes of nationwide applicability. With respect to proprietary jurisdiction areas, remember that the general rule is that state law applies, but not federal law. There are, however, exceptions. Some

federal criminal statutes apply on a nationwide basis, meaning that they also apply even in areas of proprietary jurisdiction. They apply nationwide, everywhere throughout the United States, even off post. If a person commits a violation of one of these laws, he may be prosecuted by the federal government, whether he committed the crime on a military installation or not, whether the crime was committed on an exclusive, concurrent, or proprietary jurisdiction area.

QUESTION: HOW DO YOU TELL IF THE FEDERAL CRIMINAL LAW APPLIES NATIONWIDE, AS OPPOSED TO ONLY IN CERTAIN AREAS?

ANSWER: YOU WILL HAVE TO LOOK AT THE STATUTE THAT IS INVOLVED. SOME LAWS STATE THAT THEY ONLY APPLY WITHIN "THE SPECIAL MARITIME AND TERRITORIAL JURISDICTIONS OF THE UNITED STATES." THIS MEANS AREAS UNDER EXCLUSIVE OR CONCURRENT FEDERAL JURISDICTION, BUT NOT PROPRIETARY JURISDICTION. EXAMPLES OF SUCH LAWS ARE THE FEDERAL CRIMINAL STATUTES WHICH PROHIBIT ARSON (18 USC SECTION 81), ASSAULT (18 USC SECTION 113), ROBBERY (18 USC SECTION 2111), MANSLAUGHTER (18 USC SECTION 1112), AND MURDER (18 USC SECTION 1111). SUCH LAWS ARE LIMITED, IN THAT THEY DO NOT APPLY NATIONWIDE. WHETHER A CIVILIAN CAN BE PROSECUTED WILL DEPEND, THEN ON WHERE THE CRIME WAS COMMITTED.

An example of a law which applies nationwide is 18 USC Section 1751. This statute makes it a federal crime to kill, to attempt to kill or to kidnap the President of the United States or the Vice-President. The language of this law does not say that it applies only in areas of "the special maritime and territorial jurisdiction of the United States." It is not, then, limited to crimes that are committed in areas of exclusive or concurrent federal jurisdiction. Instead it applies everywhere.

Another example of a law which applied nationwide is 18 USC Section 1114, as well as Section 1111. These laws, you will recall, make it a federal criminal offense to murder or assault various federal law enforcement officials. As we saw, they apply even outside of the United States, which is also true of Section 1751 (the law covering the assassination of the President).

Some other examples of federal laws which apply nationwide are robbery when personal property of the U.S. is taken (18 USC Section 2112), bank robbery (18 USC Section 2113), robbery of a post officer or a postal employee (18 USC Section 2114), and burglary of a post officer (18 USC Section 2115).

QUESTION: WHAT DO YOU CALL A LAW WHICH APPLIES EVEN OUTSIDE OF THE UNITED STATES?

ANSWER: IT IS REFERRED TO AS A CRIME WITH EXTRATERRITORIAL EFFECT.

g. Federal crimes of extraterritorial applicability. Examples of crimes which apply on an extraterritorial basis include bribery (18 USC Section 201), conflict of interest (18 USC Section 208), counterfeiting (18 USC Section 25), and false, fictitious, or fraudulent claims (18 USC Section 287). In U.S. v.

Glaude, 4 MJ 1 (CMA, 1977), the court explained that Congress clearly has the power to provide for extraterritorial applicability of a federal criminal statute. The issue is not whether it CAN do so, but whether it HAS done so.

QUESTION: HOW DO YOU TELL IF A FEDERAL CRIMINAL STATUTE APPLIES ON AN EXTRATERRITORIAL BASIS?

ANSWER: SOMETIMES, THE LANGUAGE OF THE STATUTE WILL SAY WHERE IT APPLIES. IF IT SAYS IT APPLIES IN "THE SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES," THEN IT ONLY APPLIES ON AREAS OF EXCLUSIVE OR CONCURRENT FEDERAL JURISDICTION AN DOES NOT APPLY OVERSEAS. OTHER TIMES, THE LAW WILL CLEARLY STATE THAT IT APPLIES ON AN EXTRATERRITORIAL BASIS. SOMETIMES, HOWEVER, THE STATUTE ITSELF IS SILENT.

In U.S. v. Claude, 4 MJ 1 (CMA, 1977), the court explained that the "application of a penal statute is not automatically limited to crimes committed within the territorial jurisdiction of the sovereign just because a penal provision lacks express language that it should be applied extraterritorially." Instead, it depends on the purpose of the law. In U.S. v. Bowman, 260 US 94, 67 LEd 149, 43 SCt 39 (1977), the Supreme Court explained that it is a question of "statutory construction: "

> "Crimes against private individuals or their property, like assaults, murder, burglary, larceny, robbery, arson, embezzlement, and frauds of all kinds which affect the peace and good order of the community, must, of course, be committed within the territorial jurisdiction of the government where it may properly exercise it (jurisdiction). If punishment of them is to be extended to include those committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute...But the same rule of interpretation should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction or fraud, wherever perpetrated, especially if committed by its own citizens, officers, or agents...to limit their focus to the strictly territorial jurisdiction would be greatly to curtail the scope and usefulness of the statute, and leave open a large immunity for frauds...In such cases, Congress has not thought it necessary to make specific provisions in the law that the laws shall include the high seas and foreign countries, but allows it to be inferred from the nature of the offense."

A good illustration of this principle is U.S. v. Mosley, 14 MJ 852 (ACMR, 1982). There, the court was dealing with 18 USC Section 500, which prohibited the forgery and counterfeiting of U.S. Postal Service money orders. The statute did not specifically state whether or not it applied overseas. The court explained that it "must examine the thrust of the statute to determine whether the congressional intent is to protect a governmental rather

than (a) private interest." Here, the "primary thrust" of the law "is the protection of the U.S. Postal Service." The court, therefore, concluded:

> "The United States government has an absolute duty to maintain the integrity of the U.S. Postal System, which includes its postal money orders, both within the borders and in foreign countries...It is reasonable to assume that Congress was aware that the integrity of the postal system and its money orders would be threatened abroad as well as at home, and it is proper to infer that Congress intended to protect the government against forgery of these papers wherever the postal system operated."

The U.S. government, then, "has a paramount interest in protecting its property, wherever located, by assertions of its penal laws... laws punishing fraud against the government include by implication acts committed in foreign countries." Based on these factors, 18 USC Section 500 was deemed to have extraterritorial effect.

Congress recently passed 18 USC Section 2331, which prohibits the commission of terrorist acts (including murder and certain other forms of physical violence) when committed "abroad against United States Nationals." This is an example of a criminal law which applies on an extra-territorial basis. It explicitly prohibits the commission of certain acts when committed "abroad against United States Nationals." This language obviously shows that Congress intended this law to apply outside the Continental United States.

Another antiterrorism law is 18 USC Section 1203, which prohibits hostage taking overseas, if the offender or victim is a U.S. national, or if the offenders make demands of the United States government. Again, by its language, this law applies on an extraterritorial basis. You can tell this from the wording of the law itself. Its language clearly shows that Congress intended for this law to apply overseas. Unless the laws were to be given extraterritorial effect, this language would be rendered totally meaningless. Remember, Congress has the power to pass extraterritorial criminal laws--the only issue is whether it HAS done so. Here, the answer is yes. Where terrorists kidnap Americans overseas and hold them hostage, or where they subject the victims to various forms of violent treatment (including death), the terrorists can be tried in federal courts for their criminal acts. The statutes mentioned here were Congress' response to the terrorist threat--and the need to protect Americans outside the boundaries of the United States.

QUESTION: ASSUMING THE TERRORIST COMMITTED SUCH AN ACT OVERSEAS, HOW WOULD THE U.S. GAIN CUSTODY OF THE OFFENDER?

ANSWER: THERE ARE SEVERAL POSSIBILITIES. FOR ONE THING, WE MAY ASK ANOTHER NATION TO EXTRADITE THE OFFENDER TO THE UNITED STATES FOR PROSECUTION. THERE ARE VARIOUS INTERNATIONAL AGREEMENTS WHICH COVER THIS SUBJECT. ALSO, THE UNITED STATES AUTHORITIES COULD APPREHEND THE OFFENDER IN INTERNATIONAL WATERS.

QUESTION: COULD THE FOREIGN GOVERNMENT ALSO PROSECUTE THE OFFENDERS?

ANSWER: YES. THIS WOULD BE A SITUATION OF CONCURRENT JURISDICTION, BETWEEN THE UNITED STATES AND THE FOREIGN GOVERNMENT, DEPENDING ON THE LAWS OF THE OTHER NATION. AN AMERICAN (SOLDIER OR CIVILIAN) WHO COMMITS A CRIME IN A FOREIGN COUNTRY IS SUBJECT TO THE LAWS OF THAT NATION. WE WILL RETURN TO THIS ISSUE SHORTLY.

h. The U.S. Magistrate's court system. As we have already seen, a civilian who commits a crime on post may be apprehended by military law enforcement officials. Since there is no court-martial jurisdiction over civilians, except during declared wars, the civilian offender can only be prosecuted in civilian court. Not all crimes, however, are going to be referred to the U.S. Attorney for prosecution. While felonies will generally be so referred, this is not true of all misdemeanors. The U.S. Attorney's Office may be too involved with the prosecution of other felony cases to handle all of the military cases, particularly the misdemeanors. An alternative is the U.S. Magistrate's Court System: "Any individual military or civilian, who commits a misdemeanor in an area of exclusive or concurrent federal jurisdiction a military installation located within the judicial district of a U.S. District Court may be prosecuted before a U.S. Magistrate." (AR 27-40, paragraph 6-5a.)

The U.S. Magistrate is a federal judge "designated to try misdemeanors committed on an installation." (AR 27-40, paragraph 6-5b.) An attorney from the SJA office will normally act as the prosecutor (AR 27-40, paragraph 6-3-1). The Magistrate "shall have jurisdiction to try persons accused of, and sentence persons convicted of, misdemeanors." (18 USC Section 3401a.) The U.S. Magistrate's Court also has jurisdiction over juveniles who commit on-post misdemeanors (18 USC Section 3401(g).

The purposes of this system include "convenience to the public" and the "enforcement of misdemeanor laws on Army installations." (AR 190-29, paragraph 6.) It is a federal court, as was noted. Cases most frequently tried here include larceny, assault, and traffic offenses. Since the court's jurisdiction is limited to the trial of misdemeanor cases, it may not impose a sentence of imprisonment in excess of one year. The magistrate may not sentence a juvenile who is tried as a juvenile to any period of confinement. [18 USC Section 3401(g)].

Offenders are cited to appear in U.S. Magistrate's Court by the issuance of DD Form 1805 (Citation). Some offenses allow for a mail-in fine, while others require a court appearance (AR 190-29, paragraph 7). The trial of a juvenile may necessitate a certification by the U.S. Attorney that the state juvenile court "lacks jurisdiction, refuses to assume jurisdiction, or does not have adequate programs and services available." (AR 190-29, paragraph 15.) This will, of course, require coordination between the SJA and the local civil authorities.

The offender may, of course, be a soldier. The U.S. Magistrate will have jurisdiction over on-post misdemeanors, whether committed by civilians or soldiers. However, "personnel subject to the UCMJ who pay a fine or forfeit collateral or whose cases are disposed of under the (magistrate's court system) will not be punished under the UCMJ for the same violation." (AR 190-29, paragraph 14.) This is because the military and the federal government both represent the same sovereign. Consequently, both may not prosecute an individual for the same crime, as to do so would violate the double jeopardy prohibition in the U.S. Constitution. To avoid a possible problem here, "installation commanders should establish policies on how to refer active duty Army personnel to the U.S. magistrate for disposition when the violator's conduct constitutes a misdemeanor within the magistrate's jurisdiction and is also a violation of the UCMJ" (AR 190-29, paragraph 14). As an example, the post commander may want to keep jurisdiction over certain traffic offenses (DUI) that were committed by officers and/or senior enlisted personnel. This is only an illustration, and much will depend on the particular situation facing an individual installation.

PART F - STATUS OF FORCES AGREEMENTS (SOFA)

1. General.

QUESTION: IF A U.S. CITIZEN COMMITS A CRIME OVERSEAS, WHO CAN PROSECUTE HIM?

ANSWER: IF THE U.S. CRIMINAL STATUTE APPLIES OVERSEAS, THEN THE U.S. CAN PROSECUTE. ALSO, THE FOREIGN COUNTRY IN WHICH THE CRIME OCCURRED CAN PROSECUTE.

QUESTION: WHAT IF THE OFFENDER IS A SOLDIER?

ANSWER: THERE ARE SEVERAL POSSIBILITIES. AS WE SHALL SOON SEE, THE SOLDIER CAN BE COURT-MARTIALED NO MATTER WHERE THE CRIME TOOK PLACE. HE IS ALSO SUBJECT TO PROSECUTION BY THE FOREIGN COUNTRY. FINALLY, HE IS ALSO SUBJECT TO THE U.S. CODE; IF THE U.S. CRIMINAL STATUTE APPLIES OVERSEAS, (EXTRATERRITORIAL) THE U.S. COULD PROSECUTE HIM IN A FEDERAL CIVILIAN COURT.

QUESTION: IS THERE A DOUBLE JEOPARDY PROBLEM HERE?

ANSWER: YES. THE MILITARY AND THE U.S. GOVERNMENT CANNOT BOTH PROSECUTE SOMEONE FOR THE SAME CRIME. REMEMBER, THEY ARE THE SAME SOVEREIGN.

A SOFA is an agreement (treaty) between the U.S. and a foreign country in which we station troops. It defines the legal status of the armed forces of one nation when they are stationed on another nation's territory. It includes both the rights and the responsibilities of the visiting force. Subjects covered in a SOFA include criminal jurisdiction, claims, taxation, customs, immigration, motor vehicle registration, use of public services, etc.

QUESTION: WHAT IS THE "RECEIVING STATE?"

ANSWER: THIS IS THE COUNTRY WHICH HAS ARMED FORCES FROM ANOTHER COUNTRY STATIONED WITHIN ITS TERRITORY.

QUESTION: WHAT IS THE "SENDING STATE?"

ANSWER: THIS IS THE COUNTRY WHICH HAS ITS ARMED FORCES STATIONED IN SOME OTHER COUNTRY.

2. Criminal jurisdiction.

A SOFA covers soldiers, civilian employees, and dependents. These, of course, are the categories of persons the sending state sends into the receiving state. Civilian employees are defined as "the civilian component" i.e., U.S. nationals and U.S. citizens employed by or under contract with the United States.

a. Exclusive jurisdiction. The receiving state is given exclusive jurisdiction over U.S. military personnel, members of the civilian component, and dependents with respect to conduct which violates the law of the receiving state but not the law of the sending state (U.S.). The U.S. would have exclusive jurisdiction over conduct which violates U.S. law, but not the law of the receiving state. This would include military offenses under the UCMJ, including disrespect to and disobedience of commissioned, warrant, and noncommissioned officers.

QUESTION: CAN THE U.S. ALWAYS PROSECUTE ONE OF ITS CITIZENS WHO COMMITS A CRIME OVERSEAS?

ANSWER: NO. AS WE SHALL SOON SEE, A SOLDIER CAN BE COURT-MARTIALED NO MATTER WHERE HIS CRIME OCCURRED. IF THE OFFENDER IS A CIVILIAN, HOWEVER, THE U.S. CAN PROSECUTE ONLY IF THE CRIME APPLIES EXTRATERRITORIALLY.

b. Concurrent jurisdiction. Most crimes committed overseas by our soldiers fall into this category. Within the United States, concurrent jurisdiction means that both the federal and state governments can prosecute (since the laws of both were violated). Overseas, this term means that both the United States and the host nation can prosecute (since the laws of both were violated).

QUESTION: CAN THE RECEIVING AND SENDING STATE BOTH PROSECUTE SOMEONE FOR THE SAME CRIME?

ANSWER: THIS IS NOT REALLY A DOUBLE JEOPARDY PROBLEM, AS THERE ARE TWO SEPARATE SOVEREIGNS. IT SHOULD BE NOTED, HOWEVER, THAT MOST SOFAs PROVIDE THAT ONCE A PERSON HAS BEEN PUNISHED OR ACQUITTED BY THE COURTS OF ONE NATION, HE MAY NOT THEN BE TRIED BY THE OTHER NATION.

QUESTION: IN CASES OF CONCURRENT JURISDICTION, HOW DO YOU DECIDE WHO GETS THE CASE?

ANSWER: THIS IS ONE OF THE PROVISIONS OF THE SOFA. ONE OF THE COUNTRIES WILL BE GIVEN THE PRIMARY RIGHT TO EXERCISE ITS JURISDICTION, DEPENDING ON WHAT TYPE OF CASE IT IS.

QUESTION: WHAT KIND OF CASES WILL THE U.S. HAVE THE PRIMARY RIGHT TO EXERCISE JURISDICTION OVER?

ANSWER: ONE CATEGORY IS OFFENSES SOLELY AGAINST THE PROPERTY OR SECURITY OF THE U.S. AN EXAMPLE WOULD BE THE DESTRUCTION OF U.S. GOVERNMENT PROPERTY. ANOTHER CATEGORY IS OFFENSES SOLELY AGAINST THE PROPERTY OF ANOTHER SOLDIER, A MEMBER OF THE CIVILIAN COMPONENT, OR A DEPENDENT. A THIRD CATEGORY IS OFFENSES ARISING OUT OF AN ACT OR OMISSION DONE IN THE PERFORMANCE OF OFFICIAL DUTY. THIS DOES NOT INCLUDE EVERY ACT COMMITTED BY ONE WHO IS ON DUTY; RATHER, IT INCLUDES ONLY ACTS WHICH ARE REQUIRE OR AUTHORIZED TO BE DONE AS A FUNCTION OF THE DUTY WHICH THE SOLDIER IS PERFORMING. FOR EXAMPLE, THE GENERAL'S DRIVER IS PERFORMING AN ACT REQUIRED BY OFFICIAL DUTY WHEN HE IS DRIVING THE GENERAL TO A MEETING. IF, WHILE WAITING FOR THE GENERAL TO COME OUT OF THE MEETING, THE DRIVER GOES TO THE PX, HE IS ON DUTY, BUT IS NOT THEN PERFORMING AN ACT REQUIRED BY OFFICIAL DUTY.

QUESTION: WHEN DOES THE RECEIVING STATE HAVE THE PRIMARY RIGHT TO EXERCISE JURISDICTION?

ANSWER: IN ALL OTHER CASES.

QUESTION: IF A COUNTRY HAS THE PRIMARY RIGHT TO EXERCISE JURISDICTION, MUST IT DO SO?

ANSWER: NO. U.S. POLICY IS TO MAXIMIZE ITS EXERCISE OF JURISDICTION, BUT THE SOFA MAY ALLOW US TO WAIVE THIS (DEPENDING, OF COURSE, ON THE FACTS OF A CASE). ALSO, WE COULD ASK THE HOST NATION TO WAIVE ITS PRIMARY RIGHT AND GIVE THE CASE TO US.

QUESTION: CAN OUR MP PATROL OFF POST IN THE FOREIGN COUNTRY?

ANSWER: YES, DEPENDING ON THE PROVISIONS OF THE SOFA. THE SOFA WILL ALSO COVER THE RIGHT OF HOST NATION POLICE TO COME ON POST, AS WELL AS OUR MUTUAL OBLIGATION TO ASSIST ONE ANOTHER IN CRIMINAL INVESTIGATIONS.

c. Due process rights. The SOFA sets out the rights of our people who are being prosecuted by the host nation. These are similar to the rights which apply at U.S. criminal trials. The purpose of these provisions is to assure that the accused receives a fair trial.

QUESTION: IF A U.S. SOLDIER IS GOING TO BE TRIED BY THE HOST NATION, WHO WILL CONFINE HIM?

ANSWER: THE SOFA WILL COVER THIS ISSUE AND MAY GIVE THE U.S. CUSTODY UNTIL AFTER THE TRIAL. WHEN THE TRIAL IS OVER, THE ACCUSED WILL SERVE HIS

SENTENCE IN THE HOST NATION'S PRISON. THE SOFA WILL PROVIDE FOR VISITS BY AN AMERICAN REPRESENTATIVE ON A REGULAR BASIS.

QUESTION: CAN WE ADMINISTRATIVELY DISCHARGE A SOLDIER WHILE HE IS IN A FOREIGN CONFINEMENT?

ANSWER: NO. OUR POLICY IS NOT TO ABANDON OUR PEOPLE. WE MAY CONDUCT A DISCHARGE PROCEEDING AND EVEN APPROVE A DISCHARGE, BUT IT WILL NOT BE EXECUTED UNTIL THE SOLDIER IS RELEASED FROM THE FOREIGN CONFINEMENT AND RETURNED TO THE UNITED STATES.

PART G - THE JURISDICTION OF A COURT-MARTIAL

1. General. "Jurisdiction is the power of a court to try and determine a case. If a court has the power to try and determine a case, its judgement is valid. If a court does not have the power to decide a case, its judgement is void." (DA Pam 27-174, paragraph 4-2.)

2. Jurisdiction over the person--who is subject to the UCMJ?

a. General. The general rule may be states as follows: "To have jurisdiction over a person, the accused must not only be a person subject to the Code at the time of the offense and at the time of trial by court-martial, but also his status must not validly have been terminated between these two events." (DA Pam 27-174, paragraph 4-2a.) Under Article 2, UCMJ, "the voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction...and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment."

b. The "constructive enlistment" issue. The issue of recruiter misconduct/fraudulent enlistment was one which plagued the courts for many years. People used to enlist while under the influence of drugs or alcohol; after serving in the military for a year or so, they might commit a crime and face a court-martial jurisdiction, because the enlistment was void at its inception. The same was true for those who enlisted when underage, or who were involved in situations of recruiter malpractice. In some cases, for example, the recruiter might allegedly have provided the enlistee with the answers to the Armed Forces Qualification Exam, or have accomplished the enlistment of someone who was illiterate, or somehow disqualified from enlisting. After serving in the military for a year or so, the enlistee might commit an offense and face court-martial. However, the court-martial lacked jurisdiction to try this soldier because his enlistment was void at its inception.

The situation was remedied, in November, 1979, through an amendment to Article 2, UCMJ. The current law reads: "Notwithstanding any other provision of law, a person serving with an armed force who--(l) submitted voluntarily to military authority; (2) met the mental competency and minimum age qualifications at the time of voluntary submission to military authority; (3) received military pay or allowances; and (4) performed military duties" is

subject to the UCMJ (Article 2c, UCMJ). In other words, even if the enlistment was defective at its inception, the court may uphold court-martial jurisdiction based on the finding of a "constructive enlistment." U.S. v. Hirsch, 26 MJ 800 (ACMR 1988).

c. Article 2. UCMJ. This provision lists various categories of person who are subject to the UCMJ, and therefore, to the jurisdiction of a court-martial. This list includes the following:

(1) Members of a regular component of the armed forces. This includes persons "awaiting discharge after expiration of their terms of enlistment," inductees, etc. This covers, of course, persons on active duty.

The "constructive discharge" issue was raised in U.S. v. Poole, 30 M.J. 149 (CMA 1990). In that case, seaman Poole's term of enlistment had expired and he was waiting discharge a few weeks later at which time he went AWOL. Prior to his unauthorized absence, Poole had asked if he were scheduled to be discharged. Poole was referred to the vessel legal officer. Poole went AWOL while his vessel was preparing for an imminent 8 month deployment. Poole claimed that since the Navy failed to discharge him within a "reasonable time" after the expiration of his enlistment, he was no longer subject to court-martial jurisdiction. The court, in stating that Article 2, UCMJ, 10 USC Section 802 is to be given its plain and ordinary meaning, held military jurisdiction continues until a service member's military status is terminated by discharge from enlistment, and that the UCMJ contains no express exception for situations such as here in which the military reasonably delays discharge subsequent to the end of enlistment.

(2) Cadets of the service academies. This includes West Point, Annapolis, the Air Force Academy, and the Coast Guard Academy. It does not include ROTC cadets.

(3) Reservists and national guardsmen. Reservists are subject to the UCMJ when performing six months' "active duty for training." They are also subject to the UCMJ when performing annual 2-week training. Under recent amendments to the UCMJ (effective 1 July 1988), they are also subject to UCMJ jurisdiction when performing weekend training (inactive duty training). This is covered in Article 2(a) 3, UCMJ. A reservist would also be subject to the UCMJ if he is otherwise on active duty status.

Once ordered to active duty for training in the armed forces, a reservist is subject to the UCMJ and court martial jurisdiction from the date he was ordered to appear for training, starting one minute past midnight on the date he was ordered to appear for training. U.S. v. Cline, 29 MJ 83 (CMA 1989).

These amendments also provide that "a member of a reserve component who is subject to [the UCMJ] is not, by virtue of the termination of a period of active duty or inactive duty training, relieved [from being subject to court-martial jurisdiction] for an offense [under the UCMJ] committed during such period of active duty or inactive duty training."

(Article 3(d), UCMJ.) "A member of a reserve component who is not on active duty...may be ordered to active duty involuntarily for the purpose of...trial by court-martial (or) nonjudicial punishment...with respect to an offense committed while the member was (A) on active duty; or (B) on inactive duty training." (UCMJ, 2(d).) The order to active duty must be done by "a person empowered to convene general courts-martial in a regular component of the armed forces." (UCMJ, Article 2(d)4.)

National guardsmen are subject to the UCMJ when on six-month initial active duty for training, or when federalized under Title 10, United States Code. Otherwise, they are under state control. District of Columbia National Guardsmen are in a unique situation in that they enter the National Guard in a federal status under Title 32, United States code. Although they are federal employees, they are not subject to the UCMJ except when on six-month active duty for training or when federalized under Title 10 United States Code. As National Guardsmen, when not subject to the UCMJ, they are subject to the Uniform Code of the District of Columbia (39 DC Code 704).

(4) Retired members of a regular component of the armed forces who are entitled to pay.

Person v. Bloss, 28 MJ 376 (CMA 1989). In Pearson, court-martial jurisdiction was found to exist over a retired enlisted accused for offenses he committed both while on active duty and while in a retired status. A retired member of the Regular Armed Forces may be ordered to active duty by the Secretary of the military department concerned at any time (10 USC Section 688). Therefore, Article 2(a)(4), UCMJ, which provides that, "[retired members of a regular component of the armed forces who are entitled to pay]" are subject to the UCMJ is constitutional.

In U.S. v. Hooper, 26 CMR 417 (CMA, 1958), a retired Naval rear admiral was court-martialed for sodomy and conduct unbecoming an officer. The court explained that "retired personnel are a part of the land or naval forces." The military retiree, then, is not simply a civilian. The court held that the admiral was "a part of the military forces of this country." He was described as "an officer of the Navy of the United States, entitled to wear the uniform and to draw pay as such." Nonetheless, it is DA policy that "retired personnel subject to the Code will not be tried for any offense by any military tribunal unless extraordinary circumstances are present." (DA Pam 27-174, paragraph 4-5.)

(5) Members of the Fleet Reserve and the Fleet Marine Corps Reserve. In U.S. v. Overton, 24 MJ 309 (CMA, 1987), the court upheld court-martial jurisdiction over "members of the fleet reserve and the fleet marine corps reserve," which is provided for in Article 2(a)(6), UCMJ. The accused had completed 20 or more years of active service, and was subject to being ordered by competent authority to active duty. This was also based on 10 USC section 6485(a): "In time of peace any member of the fleet reserve or the fleet marine corps reserve may be required to perform not more than two months' active duty for training in each four-year period." Finally, he was receiving "retainer pay."

(6) Persons in custody of the armed forces serving a sentence imposed by a court-martial. This includes prisoners in a military stockade and at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas. This is true even if the soldier received a punitive discharge as part of his court-martial sentence. U.S. v. Harry, 25 MJ 513 (AFCMR 1988).

(7) Prisoners of war in custody of the armed forces. There are several other categories of persons listed in Article 2, UCMJ, as being subject to the jurisdiction of a court-martial. These other categories, however, are rarely invoked and rarely litigated.

3. Court-martial jurisdiction over civilians. Article 2(a)(10), UCMJ, states that there is court-martial jurisdiction over "in time of war, persons serving with or accompanying an armed force in the field." In U.S. v. Averette, 41 CMR 363 (CMA, 1970), the court held that this only applied to "a war formally declared by Congress."

QUESTION: CAN WE COURT-MARTIAL A CIVILIAN DEPENDENT OR A DA CIVILIAN EMPLOYEE IN PEACETIME?

ANSWER: NO. IN KINSELLA V. KRUEGER, 354 U.S. 1, LEd 2d 1148, 77 SCt 1222 (1957), A DEPENDENT WIFE ACCOMPANIED HER SOLDIER-HUSBAND OVERSEAS TO JAPAN, WHERE SHE MURDERED HIM. THE HOST NATION (JAPAN) DECLINED PROSECUTION. STATE LAW OBVIOUSLY DID NOT APPLY OVERSEAS IN JAPAN, AND THE U.S. FEDERAL CIVILIAN STATUTE AGAINST MURDER DID NOT APPLY EXTRATERRITORIALLY. CONSEQUENTLY, THE MILITARY ELECTED TO COURT-MARTIAL THE WIFE, AND SHE RECEIVED A SENTENCE OF LIFE IMPRISONMENT. THE U.S. SUPREME COURT REVERSED THE CONVICTION, EXPLAINING THAT A "A STATUTE CANNOT BE FRAMED BY WHICH A CIVILIAN CAN LAWFULLY BE MADE AMENDABLE TO THE MILITARY JURISDICTION IN TIME OF PEACE." THE RESULT WAS THE SAME IN REID V. COVERT, 354 U.S. 1, LEd 2d 1148, 77 SCt 1222 (1957), A COMPANION CASE TO KINSELLA. THIS INVOLVED THE DEPENDENT WIFE OF AN AIR FORCE SERGEANT WHO MURDERED HIM OVERSEAS IN ENGLAND. THE CONVICTION, AGAIN, WAS REVERSED.

Kinsella v. Singleton, 361 US 234, 4 LEd.2d 268, 80 SCt 297 (1960), involved dependent wife who was court-martialed along with her soldier-husband for involuntary manslaughter in the death of their child overseas in Germany. The Supreme Court explained that the test for jurisdiction is one of STATUS, "namely whether the accused in the court-martial can be regarded as falling within the term 'land and naval forces.'" Again, the conviction was overturned.

The accused in Grisham v. Hagan, 361 US 278 4LEd.2d 279, 80 SCt 310 (1960), was a civilian employee of the Army, overseas in France. He was working on an Army installation, and was court-martialed for premeditated murder. Again, the conviction was reversed. In McElroy v. U.S., 361 US 281 4 LEd.2d 282, 80 SCt 305 (1960), a civilian employee of the Air Force was court-martialed in Morocco for the offense of larceny. Again, the conviction was reversed. It appears clear, then, that peacetime court-martial jurisdiction

over civilian dependents and employees in overseas situations is unconstitutional. (DA Pam 27-174, paragraph 5-2.)

QUESTION: COULD THESE CIVILIANS HAVE BEEN PROSECUTED BY THE HOST NATION?

ANSWER: YES. AS WE HAVE SEEN, AN AMERICAN WHO COMMITS A CRIME IN A FOREIGN COUNTRY IS SUBJECT TO THE LAWS OF THAT NATION. IN THE CASES NOTED ABOVE, HOWEVER, THE FOREIGN GOVERNMENTS DECLINED PROSECUTION.

4. Off-post crimes committed by soldiers--the rise and fall of the "service-connection test". Prior to 1969, military status was a sufficient basis for the exercise of military jurisdiction over an accused (DA Pam 27-174, paragraph 6-1b). In 1969, however, the Supreme Court changed this. In O'Callahan v. Parker, 395 U.S. 258, 23 LEd 2d 291, 89 SCt 1683 (1969), an Army sergeant was stationed at Fort Shafter, Hawaii. While off post and on pass, he broke into a hotel room which was occupied by a 14-year-old civilian girl. He attempted to rape her, but fled as a result of her screams for help. He was subsequently apprehended by the Honolulu police, who released him to the military. He was court-martialed for housebreaking and attempted rape. The Supreme Court reversed, noting that the crimes were committed off post, off duty, and while the accused was in civilian clothing. It concluded that in order to have court-martial jurisdiction, the soldier's offense had to be "service connected."

QUESTION: WHAT WOULD MAKE A CRIME "SERVICE-CONNECTED?"

ANSWER: IN RELFORD V. COMMANDANT, 401 U.S. 355, 28 LEd 2d 102, 91 SCt 649 (1971), CORPORAL RELFORD HAD BEEN COURT-MARTIALED FOR TWO RAPES WHICH HAD BEEN COMMITTED ON FORT DIX, NEW JERSEY. THE SUPREME COURT UPHELD THE CONVICTION, HOLDING THAT WHEN A SOLDIER IS CHARGED WITH HAVING COMMITTED AN OFFENSE ON POST WHICH VIOLATES THE SECURITY OF ON-POST PERSONS OR PROPERTY, THE OFFENSE IS TRIABLE BY COURT-MARTIAL. AS FOR OFF-POST OFFENSES, THE COURT TRIED TO CLARIFY WHAT IT MEANT BY THE TERM "SERVICE CONNECTION." IT SET FORTH TWELVE FACTORS, WHICH CAME TO BE KNOWN AS THE "RELFORD FACTORS." THESE INCLUDED SUCH THINGS AS WHETHER THE CRIME WAS COMMITTED AT A PLACE UNDER MILITARY CONTROL; WHETHER THERE WAS A CONNECTION BETWEEN THE ACCUSED'S MILITARY DUTIES AND THE CRIMES; WHETHER THE VICTIM HAD BEEN PERFORMING ANY DUTY RELATED TO THE MILITARY; WHETHER THERE WAS A FLOUTING OF MILITARY AUTHORITY, A VIOLATION OF MILITARY PROPERTY, OR A THREAT TO A MILITARY POST; AND WHETHER THERE WAS A CIVILIAN COURT IN WHICH THE CASE COULD BE PROSECUTED.

O'Callahan and Relford spawned considerable confusion (and litigation) as to the meaning of service-connection. The distinction between what was and what was not "service-connected" was a blurred one indeed.

In U.S. v. Solorio, 21 MJ 512 (CGGMR, 1985), the accused was a member of the U.S. Coast Guard on active duty in Alaska. Most Coast Guard personnel in that district (Juneau) resided off post in the civilian community. The accused was court-martialed for having sexually abused the daughters of fellow

Coast Guardsmen, who were assigned to the same command. The crimes occurred off post in his private home. The lower court first upheld the conviction, finding the offenses were service-connected: "The offenses by their very nature contained within them a disrupting effect on good order and discipline on that staff." It was, said the court, "a grievous breach of faith by one shipmate against another." Although the crimes occurred off post, "a command is more than a physical place or property; is it an organization of people." The conviction was affirmed, since "sex offenses against children... have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned." U.S. v. Solorio, 21 MJ 251 (CMA, 1986). The stage was set for review by the U.S. Supreme Court, which had originally created the service-connection test back in 1969.

In Solorio v. U.S., 483 US 435 97 LEd.2d 364, 107 SCt 2924 (1987), the Supreme Court noted the "confusion" that had been created by the service-connection test. It then ruled that the jurisdiction of a court-martial "depends solely on the accused's status as a member of the armed forces, and not on the 'service connection' of the offense charged. Thus, O'Callahan is overruled." The test for jurisdiction, then, is solely "one of status--namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling with the term 'land and naval forces'... the requirements of the Constitution are not violated where, as here, a court-martial is convened to try a servicemember." In other words, the soldier may be court-martialed, whether the crimes occurred on or off post. Military jurisdiction is unique, then, in that it always follows the soldier, on or off-post.

Remember, that the Army has investigative authority over matters where there is "an Army interest." This includes that situation where "there is a reasonable basis to believe that a suspect may be subject to the UCMJ." (AR 195-2, paragraph 3-lb.) Where the crime takes place off post, there will be a need to coordinate with the civilian authorities. TJAG policy Memo 87-5 (28 Jul 87) states that SJAs should review any MOUs that they have with local civilian prosecutors, as the Solorio case will make such coordination necessary:

> "When federal, state, or local civil enforcement authorities have concurrent jurisdiction, investigative responsibility will be determined in coordination with that authority. When concurrent jurisdiction or authority to investigate exists and neither the Army nor the civil authorities accede to the other's primary responsibility to investigate, both may pursue the investigation in fulfillment of their respective interests, with neither impeding the other." (AR 195-2, paragraph 3-2a.)

5. The termination of court-martial jurisdiction. AR 635-200, paragraph 1-31(a), states the general rule that a discharge "is effective at 2400 hours on the date of notice of discharge." If the soldier is given a discharge certificate earlier, however, and allowed to leave, court-martial jurisdiction may be lost. A good example of what can happen is U.S. v. Howard, 20 MJ 353

(CMA, 1985). There, the accused finished his out-processing and signed out of the command on the morning of 22 August, at which time he was given his discharge certificate. The commander, however, believed that the discharge was not effective until 2400 hours. The court concluded otherwise, and held that when the soldier was given the discharge certificate earlier, military jurisdiction ended. The court explained that the discharge "is effective upon delivery of the discharge certificate." The delivery of the discharge certificate shows that the transaction is complete. Although AR 635-200 authorized the commander to hold the soldier until 2400 hours, "the commander made an informed decision to allow appellant to be discharged at an earlier time when he authorized him to pick up his discharge certificate, as well as his DD Form 214 and travel pay, and allowed him to be released form the boundaries of the military reservation before any action was taken with a view to trial by court-martial."

One way to avoid this problem would be to have the discharge itself specify a time when it is effective. When the discharge, as in the Howard case, does not contain a specific time, the discharge is effective on delivery. There are a couple of exceptions to this rule. First, the discharge is not effective if there is an erroneous delivery of a discharge certificate. An example is the case of United States v. Garvin, 26 M.J. 194 (C.M.A. 1988)), where a Bad Conduct Discharge certificate was delivered when it was not legally permissible to do so. Another exception is where a discharge is delivered for the purpose of effecting an enlistment. In United States v. King, 27 M.J. 327 (C.M.A. 1989), the soldier was given an early discharge certificate solely for the purpose of reenlistment. When informed of the discharge, the soldier refused to enlist and absent himself without authority. The Court held that the soldier was still subject to the UCMJ, and states that three elements must exist to accomplish an early discharge:

a. Delivery of a valid discharge certificate.

b. A final accounting of pay.

c. Undergoing a "clearing" process as required under appropriate service regulations to separate the member from the military.

QUESTION: SUPPOSE A SOLDIER IS GOING TO ETS IN TWO DAYS. IS THERE ANYTHING WE CAN DO TO PREVENT THE LOSS OF COURT-MARTIAL JURISDICTION?

ANSWER: YES. RCM 202(c)(2) STATES: "ACTIONS BY WHICH COURT-MARTIAL JURISDICTION ATTACHES INCLUDE: APPREHENSION, IMPOSITION OF RESTRAINT, SUCH AS RESTRICTION, ARREST, OR CONFINEMENT, AND PREFERRAL OF CHARGES. ONCE ATTACHED, THAT JURISDICTION CONTINUES NOTWITHSTANDING THE EXPIRATION OF THAT PERSON'S TERMS OF SERVICE." (RCM 202(c)(1).) SUCH A SOLDIER. THEN, REMAINS SUBJECT TO THE UCMJ. U.S. V. BENFORD, 27 MJ 518 (NMCMR 1988).

PART H: THE RESTRICTIONS IMPOSED BY THE POSSE COMITATUS ACT ON THE EXERCISE OF LAW ENFORCEMENT POWERS OFF POST

1. General. 18 USC Section 1385 states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution for Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both." This is closely followed by the Department of the Navy as well: "Members of the Naval service shall not, in their official capacity, enforce or execute local, state, or federal civil laws." (SECNAVINST. 5820.7; 15 May 74.)

This law was originally enacted in 1878. After the Civil War, federal troops were regularly used to enforce the Reconstruction Acts. There was also "strong resentment of the use of federal troops to guard voting places in the South during the 1876 Presidential Election." (DA Pam 27-21, paragraph 3-4b.) "The proscriptions of the act apply to the enforcement of federal, state, or local law." (DA Pam 27-21, paragraph 3-4b.) The law reflects the fact that "under the Constitution and laws of the United States, the protection of life and property and the maintenance of law and order within the territorial jurisdiction of any state are the primary responsibility of local and state governments, and the authority to enforce the laws is vested in the authorities of those governments." (DA Pam 27-21, paragraph 3-7.) In other words, the enforcement of the civil law is the responsibility of the civil law enforcement authorities, not the U.S. Army. This same policy is also expressed in DOD Dir. 3025.12, August 19, 1971, as well as in AR 500-50, paragraph 1-3a: "The protection of life and property an the maintenance of law and order within the territorial jurisdiction of any state are the primary responsibilities of state and local civil authorities."

2. Exceptions.

a. Off duty. The Act does not apply to military members "when off-duty and in a private capacity." A soldier is not acting in a private capacity, however, "when assistance to law enforcement officials is rendered under direction, control, or suggestion of DOD authorities." The Act similarly does not apply to civilian employees, unless they are acting "under direct command and control of a military officer." (AR 500-51, paragraph 3-2(c) and (d).)

b. Reservists and national guardsmen. The Act does not apply to members of a Reserve Component "when not on active duty or active duty for training." Also, it does not apply to members of the national guard "when not in federal service." (AR 500-51, paragraph 3-2(a) and (b).

c. Military purpose. The Act does not prohibit "actions taken for furthering a military or foreign affairs function of the United States, regardless of incidental benefit to civilian authorities." (AR 500-51, paragraph 3-4a.)

Examples of actions that further a "military purpose" are listed in AR 500-51, paragraph 3-4(a), and include the following: "(1) actions related to enforcement of the Uniform Code of Military Justice; (2) actions likely to result in administrative proceedings by DOD, regardless of related civil or criminal proceedings; (3) actions related to the commander's inherent authority to maintain law and order on a military installation or facility; (4) protection of classified military information or equipment; (5) protection of DOD personnel, DOD equipment, and official guests of DOD; (and)(6) other actions that are undertaken primarily for military or foreign affairs purposes."

AR 195-2, paragraph 3-1(b), similarly explains that CID's investigative jurisdiction is limited to matters in which there is an "Army Interest." Examples of this are: "(1) the crime is committed on a military installation or facility; (2) there is a reasonable basis to believe that a suspect may be subject to the UCMJ; (3) there is a reasonable basis to believe that a suspect may be a civilian employee of DOD who has committed an offense in connection with his or her assigned duties; (4) the Army is the victim of the crime; e.g., the offense involves the loss or destruction of government property or allegations of fraud...relating to Army programs or personnel; (and)(5) there is a need to protect personnel, property, or activities on Army installations from criminal conduct on military installations that has a direct adverse effect on the Army's ability to accomplish its mission; e.g., the introduction of controlled substances onto Army installations."

After Solorio, the Army may be investigating more off-post incidents. The civil authorities, of course, may also be investigating them, due to their concurrent jurisdiction to both investigate and prosecute. In such cases, "investigative responsibility will be determined in coordination with that authority. When concurrent jurisdiction or authority to investigate exists and neither the Army nor the civil authorities accede to the other's primary responsibility to investigate, both may pursue the investigation in fulfillment of their respective interests, with neither impeding the other." (AR 195-2, paragraph 3-2a.) Overseas, of course, the off-post investigation must not be prohibited by a SOFA or other host nation law. If there is no applicable local agreement, off-post investigations will still require "coordination with appropriate host country authorities." (AR 195-2, paragraph 3-2b.) In this regard, TJAG policy Memorandum 87-5 (28 Jul 87) states that military jurisdiction over off-post offenses "will, by necessity, require greater coordination with civilian law enforcement agencies and prosecutors...staff and command judge advocates should review any...MOU in effect with local, state, and federal prosecutors and law enforcement officials in light of Solorio...Solorio should be discussed with these officials as soon as possible and plans made for coordination on further cases."

Also, remember that the authority to investigate off-post offenses does not confer the authority to apprehend civilians off post, or to execute civilian search warrants. As we saw earlier, these situations require coordination with the civil authorities (AR 195-2, paragraph 3-21c.)

d. Emergency (the Constitution exceptions). In an emergency, the federal government may act to "prevent loss of life or wanton destruction of property" or to "restore governmental functioning and public order." Such a situation might exist "when sudden and unexpected civil disturbances, disasters, or calamities seriously endanger life and property, and disrupt normal governmental functions so much that duly constituted local authorities are unable to control the situation." A similar situation would exist when "prompt and vigorous federal action" is necessary for the "protection of federal property and functions...when (a) the need for protecting exists (and) (b) duly constituted local authorities are unable to provide adequate protection." (AR 500-50, paragraph 2-4.)

Remember, the protection of life and property and the maintenance of order within the territorial jurisdiction of a state are "the primary responsibilities of state and local civil governments. Federal armed forces are used only after state and local civil authorities have utilized all of their own forces which are reasonably available for use, and are unable to control the situation, or when the situation is beyond the capabilities of state or local civil authorities." (AR 500-50, paragraph 1-3a.)

This emergency exception applies, then, "in cases of sudden and unexpected invasion or civil disturbance, including civil disturbances incident to earthquake, fire, flood, or other public calamity endangering life or federal property or disrupting federal functions or the normal process of government, or other equivalent emergency." Also, if the situation is "so imminent as to make it dangerous to await instructions from the Department of the Army requested through the most expeditious means of communication available", then the local commander may act "before the receipt of instructions." (AR 500-50, paragraph 2-4a.) Note, however, that "in view of the availability of rapid communications capabilities, it is unlikely that actions under this authority would be justified without prior Department of the Army approval while communications facilities are operating."

When such emergency action is taken, persons not subject to military law who are taken into custody "will be transferred, as soon as possible, to the civil authorities."

e. Statutory exceptions (10 USC Sections 331-334). There are several federal statutes "which permit the commitment of federal forces to restore order in conditions of civil disturbance, including terrorism... Congress has enacted legislation providing that the President may, upon request of a state legislature, or its governor if the legislature cannot be convened, use such of the armed forces as he consider necessary to suppress the insurrection." (DA Pam 27-21, paragraph 3-8.) This is very similar to the constitutional exception we just looked at, and reflects similar interests.

An example of this is 10 USC Section 331, which states: "Whenever there is an insurrection in any state against its government, the President may, upon request of its legislature or of its governor if the legislature cannot be convened, call into federal service such of the militia of the other states, in the number requested by that state, and use such of the armed

forces, as he considered necessary to suppress the insurrection." This requires "a formal request by a state for the assistance of federal armed forces," which "must originate with the legislature of the state concerned, or with the governor." (DA Pam 27-21, paragraph 3-8a.)

A similar state is 10 USC Section 332: "Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, makes it impracticable to enforce the laws of the United States is any state or territory by the ordinary course of judicial proceedings, he may call into federal service such of the militia of any state, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion." Another example is 10 USC Section 333, which states that the President "by using the militia or the armed forces, or both...shall take such measures as he considers necessary to suppress in a state, any insurrection, domestic violence, unlawful combination, or conspiracy, if it (1) so hinders the execution of the laws of that state, and of the United States within the state, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that state are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or (2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."

In using federal armed forces, the President shall, by proclamation, "immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time." (10 USC Section 334.) If the proclamation is not obeyed, an executive order is issued, "directing the Secretary of Defense to employ such National Guard of federal troops as are necessary to restore law and order,"(DA Pam 27-21, paragraph 3-8d.) Pursuant to these laws, federal troops were dispatched to Arkansas (1957), to Mississippi (1962), and to Alabama in 1963.

f. Terrorist incidents. A terrorist incident is regarded as a form of civil disturbance. It is DOD policy "to protect DOD personnel and family members, facilities, and equipment from terrorists' acts." (DOD DIr. 2000.12, July 16, 1986.) Although the FBI is the lead agency for combating domestic terrorists, the installation commander will provide the initial and immediate response to any incident occurring on a military installation. The FBI will be notified immediately, and will assume jurisdiction if it is determined that such an incident is of "significant federal interest." Even if the FBI does assume jurisdiction, "the military commander may take immediate action, as dictated by the situation, to prevent loss of life or mitigate property damage before the FBI response force arrives."

Overseas, the State Department will be immediately notified (as opposed to the FBI), as it has the "primary responsibility for dealing with terrorism involving Americans abroad and for enhancing the security of all U.S. government personnel overseas." The host nation, however, remains overall in charge, and the U.S. response must be coordinated with that nation.

The use of our forces overseas must be IAW the applicable SOFA with that nation.

Within the United States, the use of military forces in dealing with an off-post terrorist incident will normally necessitate presidential approval. Unless there is an overwhelming emergency preventing communication with higher headquarters, the provision of military forces in such a situation will require this approval in advance. This is IAW a Memorandum of Understanding (MOU) between DOD and DOJ, which deals with the use of federal military force in domestic terrorist incidents. This would not, as we shall soon see, prevent the giving of advice, sharing intelligence information, loaning equipment, the delivery of equipment, or the training of civilian personnel in its use.

g. Recent amendments to Title 10, U.S. Code.

(1) General. The Posse Comitatus Act prohibits the use of military forces to execute the civil laws of the United States. This extends to such things as conducting searches and seizures, arrests, stop and frisk actions; the "interdiction of a vehicle, vessel, aircraft, or other similar activity;" and the use of military personnel "for surveillance or pursuit of individuals, or as informants, undercover agents, investigators, or interrogators." (DA Pam 27-21, paragraph 3-4e.) It is, then, "a general prohibition against the use of military personnel in the enforcement of federal, state, or local law." (DA Pam 27-21, paragraph 3-5a.) It is aimed at activities which "subject civilians to the exercise of military power that is regulatory, prescriptive, or compulsory in nature" (AR 190-24 paragraph 3-4f).

(2) Furnishing information. 10 USC Section 371 states that the military may "provide to federal, state, or local civilian law enforcement officials any information collected during the normal course of military operations that might be relevant to a violation of any federal or state law within the jurisdiction of such officials." In other words, the military can provide information "collected in the normal course of military operations." This does not justify, however, planned or created missions "for the primary purpose of aiding civilian law enforcement officials." (DA Pam 27-21, paragraph 3-5b.)

(3) Equipment and facilities. 10 USC Section 372 states that the military may make available equipment and facilities "to any federal, state, or local civilian law enforcement official for law enforcement purposes." There are various approval levels, depending on the type of assistance that has been requested.

(4) Training and advice. 10 USC Section 373 states that the military "may assign members of the Army, Navy, Air Force, and Marine Corps to train federal, state, and local civilian law enforcement officials in the operation and maintenance of equipment made available under Section 372...and to provide expert advice." This would, for example, allow the military to loan a helicopter to the state sheriff, to be used in searching for an escaped civilian prisoner. It would not, however, justify using the military pilot

and crew to assist in the search for the prisoner. Wrynn v. U.S., 200 F. Supp 457 (ED NY, 1961). Such "active" assistance would be improper, and would violate the Posse Comitatus prohibition. In U.S. v. Red Feather, 392 F. Sup. 916 (D. SD, 1975), the court held that "active assistance included search and seizure, investigation, pursuit of a prisoner, etc." "Passive" assistance, on the other hand, would include advice or recommendations, the delivery of equipment or supplies, and training in the use and care thereof.

(5) Air and sea traffic monitoring. 10 USC Section 374 allows the military to assign its personnel "to operate and maintain, or assist in operating and maintaining" equipment furnished under Section 372 for the purpose of "monitoring and communicating the movement of air and sea traffic." This is aimed at such things as drug traffic and violations of the immigration laws. It "does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search or seizure, arrest, or other similar activity." (10 USC Section 375.)

h. Joint patrols. AR 190-24, paragraph 3-3(b), states that the presence of the military police officer in this situation is "for the sole purpose of enforcing the UCMJ among persons subject to the Code." This does not confer any general authority over the civilian police or the civilian population. The purposes of this program include reducing the incidence of off-installation military offenses committed by armed forces personnel, and to "enforce the UCMJ and other pertinent regulations, directives, and orders among persons subject to the UCMJ" (paragraph 3-1).

(1) Humanitarian exceptions. There are various situations in which military assistance can be provided to the civil authorities. Disaster relief is mainly the responsibility of the local government, and not the military (DA Pam 27-21, paragraph 13-3b). A similar provision is in AR 500-60, paragraph 2-1(a). Military assistance, however, may be provided when "the situation is so severe and so widespread that effective response is beyond the capacity of the state and local governments (including the National Guard)." (AR 500-60, paragraph 2-b.) This generally mandates coordination with higher authority, but "when a serious emergency or disaster is so imminent that waiting for instructions from higher authority would preclude effective response, a military commander may do what is required and justified to save human life, prevent immediate human suffering, or lessen major property damage or destruction." Military commanders "have authority to approve direct requests from civil authorities for emergency assistance to save human lives, lessen immediate human suffering, or prevent great destruction or damage." In other situations, requests are to be forwarded to HQDA. (AR 500-60, paragraph 2-17(a) and (c).)

Another example of this is search and rescue operations, which involve "a moral and humanitarian obligation to aid nonmilitary persons and property in distress." (DA Pam 27-21, paragraph 3-17a.) Army resources will be made available in support of the MAST program (Military Assistance to Safety and Traffic Program). This is provided for in AR 500-4, paragraph 4.

Still another example is explosive ordnance disposal. The local commander "may provide assistance when requested by federal agencies or civil authorities in the interest of preserving public safety. When delay in responding to such a request would endanger life or cause injury, commanders may authorize assistance to the extent necessary to prevent injury or death." (DA Pam 27-21, paragraph 3-18d.) This assistance, then, is provided "in the interest of...public safety." (AR 75-15, paragraph 3-2a.) It normally requires referral of the matter to the National Response Center, an Environmental Protection Agency/U.S. Coast Guard Operations Center. Again, if such delay "would endanger life or cause injury, commanders may authorize assistance to that extent necessary, to prevent injury or death." (AR 75-15, paragraph 3-2a.)

Similarly, AR 190-12, paragraph 4-7, deals with requests for "explosive detector dog team assistance." Installation commanders may provide such assistance to civil authorities "upon determination that such assistance is required in the interest of public safety." In such cases, "only the dog team's searching and detecting capabilities will be utilized when providing assistance to civil authorities. Use of the dog team to track and search a building or area for, and/or detect...an intruder or offender or suspect is prohibited." (AR 190-12, paragraph 4-7(c)(7).)

QUESTION: WHY IS THIS PROHIBITED?

ANSWER: THE PROPOSED OPERATION VIOLATES THE POSSE COMITATUS ACT. FURTHER, CID POLICY MEMORANDUM #5 HAS BEEN REPLACED BY DOD IG MEMORANDUM, DATED 1 OCTOBER 1987. THIS MEMORANDUM ALLOWS THE MILITARY TO CONDUCT OFFPOST, COVERT DRUG OPERATIONS THAT TARGET CIVILIAN DRUG DEALERS WHO ARE NOT SUBJECT TO THE UCMJ, IF THERE ARE REASONABLE GROUNDS TO BELIEVE THAT THE TARGETED CIVILIANS ARE DISTRIBUTING ILLEGAL DRUGS TO MEMBERS OF THE MILITARY OR ARE WORKING IN CONJUNCTION WITH MILITARY DRUG DEALERS. INVESTIGATORS ARE REQUIRED TO COORDINATE SUCH COVERT OPERATIONS WITH THE SUPPORTING SJA OFFICE, THE APPROPRIATE CIVILIAN PROSECUTOR'S OFFICE, AND THE CIVILIAN POLICE AGENCIES AFFECTED BEFORE BEGINNING THESE OPERATIONS.

QUESTION: WHY DOESN'T THIS VIOLATE THE POSSE COMITATUS ACT?

ANSWER: THERE IS AN "ARMY INTEREST" HERE. THE ARMY, FOR ONE THING, IS THE VICTIM OF THE CRIME. ALSO, THERE IS A "REASONABLE BASIS TO BELIEVE THAT A SUSPECT MAY BE SUBJECT TO THE UCMJ." (AR 195-2, PARAGRAPH 3-lb.) REMEMBER, WHEN THE PRIMARY PURPOSE OF THE INVESTIGATION FULFILLS A LEGITIMATE DA INTEREST, ANY INCIDENTAL BENEFIT TO THE CIVIL AUTHORITIES DOES NOT CONSTITUTE A VIOLATION OF THE ACT.

PART I - AUTHORITY AND JURISDICTION ASPECTS OF TERRORISM COUNTERACTION ISSUES

We have touched upon many of these problems throughout this subcourse. 18 USC Sections 2331 to 2338 entitled "Terrorism" set out a series of offenses involving international terrorism.

QUESTION: YOU ARE STATIONED OVERSEAS IN GERMANY. AN ARMED GROUP ENTERS A U.S. MILITARY BASE. THE MPs TRY TO STOP THEM, AND SEVERAL POLICE OFFICERS ARE SHOT. U.S. AUTHORITIES CAPTURE THE ASSAILANTS. CAN THE ATTACKERS BE PROSECUTED BY THE HOST NATION (GERMANY)?

ANSWER: YES. SINCE SUCH CRIMES VIOLATE THE LAWS OF BOTH NATIONS, THIS IS AN EXAMPLE OF CONCURRENT JURISDICTION.

QUESTION: DOES THE U.S. HAVE THE AUTHORITY TO PROSECUTE THE OFFENDER?

ANSWER: YES, IF THE LAW IS EXTRATERRITORIAL. REMEMBER, 18 USC SECTIONS 111 AND 114 PROTECT FEDERAL LAW ENFORCEMENT OFFICERS, A TERM WHICH INCLUDES MILITARY POLICE AND GUARDS (28 CFR PART 60). THESE LAWS APPLY OVERSEAS.

QUESTION: SUPPOSE THE OFFENDERS TOOK U.S. CITIZENS HOSTAGE?

ANSWER: THE US ANTITERRORISM STATUTES SET OUT AT 18 USC SECTION 2331 ET SEQ WOULD APPLY IF THE OFFENDER'S ACTIONS MEET THE DEFINITION OF "INTERNATIONAL TERRORISM" AND 18 USC SECTION 1203 IF THE OFFENDERS TOOK HOSTAGES TO COMPEL SOMEONE ELSE OR A GOVERNMENT TO DO OR REFRAIN FROM DOING AN ACTION. BOTH OF THESE STATUTES ARE SPECIFICALLY STATED TO BE EXTRATERRITORIAL IN APPLICATION.

QUESTION: WHAT IF IT IS A DOMESTIC TERRORIST ATTACK?

ANSWER: 18 USC SECTION 111 AND 1114, OF COURSE, WOULD STILL APPLY. ALSO, 18 USC SECTION 231, MAKES IT A FEDERAL CRIME (5 YEARS AND $10,000) "TO OBSTRUCT, IMPEDE, OR INTERFERE WITH ANY FIREMEN OR LAW ENFORCEMENT OFFICER LAWFULLY ENGAGED IN THE LAWFUL PERFORMANCE OF HIS OFFICIAL DUTIES INCIDENT TO AND DURING THE COMMISSION OF A CIVIL DISORDER WHICH IN ANY WAY OR DEGREE OBSTRUCTS, DELAYS, OR ADVERSELY AFFECTS...THE CONDUCT OR PERFORMANCE OF ANY FEDERALLY PROTECTED FUNCTION."

QUESTION: CAN A MILITARY LAW ENFORCEMENT OFFICIAL APPREHEND A CIVILIAN ON POST?

ANSWER: YES. THIS IS COVERED BY SUCH REGULATIONS AS AR 190-22 AND AR 190-30.

QUESTION: CAN CIVILIAN SECURITY GUARDS MAKE SUCH APPREHENSIONS?

ANSWER: YES. THIS IS COVERED BY AR 190-22 AND AR 190-56.

QUESTION: CAN THE CIVILIAN GUARDS USE DEADLY FORCE?

ANSWER: YES, AS PER AR 190-14.

QUESTION: IF WE APPREHEND A TERRORIST ON POST, ON A CONUS INSTALLATION, WHO CAN PROSECUTE HIM?

ANSWER: THIS DEPENDS ON TWO THINGS. FIRST, WHERE DID THE CRIME OCCUR? WAS IT AN AREA OF EXCLUSIVE, CONCURRENT, OR PROPRIETARY JURISDICTION? SECOND, IT DEPENDS ON THE CRIME THAT WAS COMMITTED. REMEMBER, SOME FEDERAL CRIMES APPLY NATIONWIDE.

QUESTION: IF THE OFFENDER IS A CIVILIAN, CAN WE COURT-MARTIAL HIM?

ANSWER: NO. THE SUPREME COURT HAS HELD THAT WE CANNOT COURT-MARTIAL CIVILIANS, EXCEPT DURING DECLARED WARS.

QUESTION: WHAT, THEN, DO WE DO WITH SUCH A CIVILIAN?

ANSWER: APPREHEND HIM AND TURN HIM OVER TO THE APPROPRIATE CIVIL AUTHORITIES.

QUESTION: OVERSEAS, WHAT HAPPENS IF THE HOST NATION ALSO WANTS TO PROSECUTE?

ANSWER: IF THE TERRORIST IS A CIVILIAN WHO IS NOT ACCOMPANYING THE US FORCES, THE SOFA WOULD NOT APPLY. INSTEAD, HE WOULD BE SUBJECT TO TRIAL BY THE CAPTURING NATION OR, IF THERE IS AN EXTRADITION TREATY BETWEEN THE US AND THE CAPTURING NATION, WE COULD ASK FOR EXTRADITION OF THIS TERRORIST FOR TRIAL IN AN APPROPRIATE FEDERAL COURT IN THE UNITED STATES. IF THE TERRORIST IS A CIVILIAN ACCOMPANYING THE US FORCES, HE WOULD ALSO BE SUBJECT TO TRIAL BY THE CAPTURING NATION OR BEING EXTRADITED TO THE UNITED STATES FOR TRIAL.

QUESTION: CAN THE MILITARY RESPOND TO AN OFF-POST TERRORIST ATTACK IN THE U.S.?

ANSWER: SUCH A SITUATION IS REGARDED AS A FORM OF CIVIL DISTURBANCE (FC 100-37, PARAGRAPH 4-4a). WE COULD LOAN THE STATE EQUIPMENT, AS THIS IS NOT CONTRARY TO THE POSSE COMITATUS ACT (TRADOC PAM 525-37, PARAGRAPH 3-4(Aa) 3). ACTUALLY FURNISHING MILITARY TROOPS TO CONTAIN THE SITUATION, HOWEVER, NORMALLY REQUIRES A REQUEST FROM THE GOVERNOR OF THE STATE AND A PRESIDENTIAL PROCLAMATION (FM 19-15, CHAPTER 3). THERE IS AN EMERGENCY EXCEPTION WHICH "AUTHORITIES PROMPT AND VIGOROUS FEDERAL ACTION" TO PREVENT LOSS OF LIFE OR WANTON DESTRUCTION OF PROPERTY AND TO RESTORE GOVERNMENTAL FUNCTIONING AND PUBLIC ORDER. THE SAME IS TRUE FOR THE "PROTECTING OF FEDERAL PROPERTY AND FUNCTIONS." IN EITHER CASE, THE SITUATION MUST BE BEYOND THE CAPABILITY OF THE LOCAL CIVILIAN AUTHORITIES TO HANDLE (AR 500-50, PARAGRAPH 2-4). THIS NORMALLY REQUIRES PRESIDENTIAL APPROVAL, UNLESS THE EMERGENCY IS SO ACUTE THAT IT WOULD BE DANGEROUS TO WAIT FOR GUIDANCE FROM HIGHER AUTHORITY (AR 500-50, PARAGRAPH 2-4a).

QUESTION: WHAT IF THE TERRORIST INCIDENT OCCURS ON POST?

ANSWER: REMEMBER, THE MILITARY TAKES IMMEDIATE ACTION TO PREVENT LOSS OF LIFE OR MITIGATE PROPERTY DAMAGE. THE FBI IS DESIGNATED AS THE "LEAD AGENCY" FOR CONUS INCIDENTS.

QUESTION: IF THE FBI SPECIAL AGENT IN CHARGE (SAC) TAKES CHARGE, WHAT HAPPENS IF THE DECISION IS MADE TO USE THE ARMED FORCES?

ANSWER: AT THAT POINT, OPERATIONAL CONTROL IS TRANSFERRED TO THE MILITARY. ONCE THE ASSAULT PHASE ENDS, COMMAND AND CONTROL RETURNS TO THE SAC (FM 100-37, CHAPTER 2).

QUESTION: IF THE USE OF MILITARY FORCE HAS BEEN AUTHORIZED BY THE PRESIDENT, UNDER WHAT AUTHORITY ARE THEY ACTING?

ANSWER: 10 USC SECTIONS 3331-4 AUTHORIZE THE COMMITMENT OF U.S. FORCES. ALSO, REMEMBER THE CONSTITUTIONAL AUTHORITY UNDER ARTICLE II.

CONCLUSION. This subcourse has been about power. What we have looked at is YOUR power, and the authority which you may lawfully exercise. We have looked at the various problems which confront our police, and the potential challenges to their authority. Always remember that subordinates will look to you for guidance. A basic understanding of these legal issues will enable you to provide it.

THIS PAGE LEFT BLANK INTENTIONALLY

PRACTICE EXERCISE

The following exercise is multiple choice. There are four possible choices to each. You are to select the one correct choice by CIRCLING the letter beside it directly on these pages. This is a self-graded lesson exercise. DO NOT look up the correct answer from the solution until you have finished. To do so will endanger your ability to learn this material. Also, your final examination score will tend to be lower than if you had followed these recommendations.

1. The Assimilative Crimes Act:

   A. adopts as state law the criminal laws of the post.
   B. allows state courts to obtain jurisdiction over military posts.
   C. adopts as federal law the criminal law of the surrounding state.
   D. allows federal courts to obtain jurisdiction over state territory.

2. O'Callahan v. Parker limited court-martial jurisdiction, in that:

   A. it created the probability test.
   B. it required the military to show a service-connection before it had court-martial jurisdiction.
   C. it allows military jurisdiction only in cases involving purely military offenses.
   D. it declared several parts of the UCMJ to be void and not enforceable.

3. At present, the Constitution, UCMJ, and Manual for Courts-Martial represent:

   A. sources of military authority.
   B. civil affairs.
   C. martial laws.
   D. the law of war.

4. Based on the double jeopardy prohibition, a person cannot be tried twice for the same crime in:

   A. a state court and in a military court (court-martial).
   B. a state court and federal court.
   C. a federal court and a military court (court-martial).
   D. all of the above.

5. Military jurisdiction is unique, because:

   A. it may follow the person outside the territorial boundaries of a post.
   B. it is limited by territorial boundaries.
   C. it only operates in time of war.
   D. it does not apply overseas.

6. As a result of the Supremacy Clause of the U.S. Constitution, the federal government has the right to carry out federal function without interference by the state under:

A. exclusive jurisdiction areas.
B. concurrent jurisdiction areas.
C. proprietary jurisdiction areas.
D. all of the above.

7. Fraud against the United States is an example of a crime which:

A. does not apply to persons in the military.
B. applies nationally.
C. state police authorities will investigate.
D. does not apply to DA civilian employees.

8. The Posse Comitatus Act forbids:

A. use of military helicopters and pilots to search off-post woods for a prisoner who has escaped from the custody of the local civilian sheriff.
B. use of MPs to direct traffic for a military convoy.
C. use of CID agents to investigate a case of fraud, committed by a soldier off-post.
D. use of military personnel to train civilian police in the use of our new polygraph equipment which we have loaned to them.

9. An angry wife shoots and kills her service member husband in their on-post quarters located n an area of concurrent jurisdiction on Fort McRucker, Alabama. She can be brought to trial for murder:

A. in a military court-martial.
B. in the U.S. Magistrate's Court.
C. in the federal district court for the area and in the Alabama state court.
D. only in the Alabama state court.

10. The authority of MPs to enforce law, orders and regulations comes mainly from the:

A. Constitution of the United States and the UCMJ.
B. Provost marshal general.
C. Commandant of the military police school.
D. Declaration of Independence.

11. Which of the following individuals would be subject to the UCMJ?

A. an active duty Marine.
B. an Air Force Academy cadet.
C. an Army Reservist on active duty for training (2 weeks).
D. all of the above.

12. Civilians violating traffic laws on a military post under exclusive or concurrent jurisdiction may be:

A. tried before a military judge under the UCMJ.
B. tried before a U.S. Magistrate under the Assimilative Crimes Act.
C. given nonjudicial punishment under Article 15, UCMJ.
D. given a verbal warning only, since the military has no jurisdiction over civilians.

13. Anniston Annie, a local civilian, has committed a series of minor crimes on Ft. McClellan. What action can be taken against her?

A. She can be barred from post through a letter from the post commander.
B. She can be tried before a military judge under the UCMJ, or given an Article 15, in the discretion of the post commander.
C. Nothing, the military has no jurisdiction over her.
D. None of the above.

14. You have apprehended a juvenile on Fort Blank, for the crime of attempted murder. Fort Blank is under exclusive federal jurisdiction. Which of the following is true?

A. He can be tried for murder before the U.S. Magistrate's Court, since he is a civilian.
B. The only thing you can do is bar him from post or release him to his parents, since he is a juvenile.
C. He can be prosecuted by the military, since he has committed a felony on a military installation.
D. He can be apprehended and turned over to the federal civil authorities for possible prosecution.

LESSON 1

PRACTICE EXERCISE

ANSWER KEY AND FEEDBACK

Item		Correct Answer and Feedback
1.	C.	adopts as federal law the criminal law of the... Then the state criminal (page 1-22, para c).
2.	B.	it required the military to show a service connection... Off-post crimes committed by soldiers - the rise and fall of the "service-connection test,"... (page 1-35, para 4).
3.	A.	sources of military authority. There are several... (page 1-2, para 2a, c).
4.	C.	a federal court and a military court (court-martial). When a soldier... (page 1-23, para d).
5.	A.	it may follow the person outside the territorial boundaries... Military jurisdiction is... (page 1-36, para 4).
6.	D.	all of the above. Under the supremacy... (page 1-3, para 2e).
7.	B.	applies nationally. But the same rule... (page 1-25, para g).
8.	A.	use of military helicopters and pilots to search... It would not, however,... (page 1-42, para g(4)).
9.	C.	in the federal district court for the area and in the... Concurrent jurisdiction... (page 1-22, para d).
10.	A.	Constitution of the United States and the UCMJ. Sources of authority... (page 1-2, para 2 a & c).
11.	D.	all of the above. This lists includes... (page 1-32, para 2c(1)(2)(3)).
12.	B.	tried before a U.S. Magistrate under the Assimilated... "Any individual military or... (page 1-27, para h).
13.	A.	She can be barred from post through a letter from the... Bar letters,... (page 1-20, para 2).
14.	D.	He can be apprehended and turned over to the federal... Not all crimes... (page 1-27, para h).